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In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

PATRICK M. HYATT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

This case, on remand for further consideration in light of this Court's decision in *Bowen* v. *City of New York*, No. 84-1923 (June 2, 1986), is a North Carolina-wide class action brought under 42 U.S.C. 405(g) to challenge the Secretary's policies regarding the manner in which allegations of pain, hypertension and diabetes mellitus are evaluated in determining whether a claimant is eligible for Social Security disability benefits. The questions presented are:

1. Whether the court of appeals erred in requiring the Secretary to reopen the claims of thousands of class members, even though (i) Congress approved the regulatory policies at issue, and (ii) the class members involved knowingly abandoned their claims when they either failed to seek administrative review of the preliminary decisions denying their claims or, if they sought administrative review, failed to seek judicial review within 60 days of the Secretary's final decision.

2. Whether the court of appeals correctly awarded respondents $204,649.90 in attorney's fees and costs under the Equal Access to Justice Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory and regulatory provisions involved	2
Statement	2
A. The statutory and regulatory framework	3
1. Procedural provisions	3
2. Substantive provisions	3
a. Evaluation of pain	3
b. Hypertension and Diabetes: The Severity Regulation	3
B. The proceedings in this case	5
Reasons for granting the petition	13
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Bowen v. *City of New York*, No. 84-1923 (June 2, 1986) . 3, 4, 8, 12, 14, 15, 17
Bowen v. *Yuckert*, cert. granted, No. 85-1409 (argued Jan. 13, 1987) 4, 14, 15, 17, 19
Bradley v. *Richmond School Board*, 416 U.S. 696 (1974) . 17
Dotson v. *Schweiker*, 719 F.2d 80 (4th Cir. 1983) 6, 7
Foster v. *Heckler*, 780 F.2d 1125 (4th Cir. 1986) 16
Heckler v. *Campbell*, 461 U.S. 458 (1983) 17
Heckler v. *Day*, 467 U.S. 104 (1984) 10
Heckler v. *Kuehner*, 469 U.S. 977 (1984) 8
Heckler v. *Lopez*, 463 U.S. 1328, motion to vacate stay denied, 464 U.S. 879 (1983) 16, 19
Heckler v. *Lopez*, 469 U.S. 1082 (1984) 8, 16
Hyatt v. *Bowen*, No. 85-474 (June 9, 1986) 12
Heckler v. *Ringer*, 466 U.S. 602 (1984) 10
Martin v. *Secretary of HEW*, 492 F.2d 905 (4th Cir. 1974) 6, 7, 16
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 3, 10
Myers v. *Califano*, 611 F.2d 980 (4th. Cir. 1980) 6, 7, 16
Pierce v. *Underwood*, cert. granted, No. 86-1512 (May 18, 1987) 19

Cases—Continued: Page

Polaski v. *Heckler*, 751 F.2d 943 (8th Cir. 1984) 9, 14, 15
Stieberger v. *Heckler*, 615 F. Supp. 1315 (S.D.N.Y. 1985), preliminary injunction vacated, 801 F.2d 29 (2d Cir. 1986) 17
United States v. *Estate of Donnelly*, 437 U.S. 286 (1970) . 16
United States v. *Mendoza*, 464 U.S. 154 (1984) 16
United States v. *Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801) 17

Statutes, regulations, and rule:

Equal Access to Justice Act, 28 U.S.C. 2412(d) 13
Social Security Act:
Tit. II, 42 U.S.C. (& Supp. III) 401 *et seq.*:
§ 205(g), 42 U.S.C. 405(g) 2, 5, 7, 8, 10, 11, 12, 14, 15, 16
§ 223(d)(1)(A), 42 U.S.C. (& Supp. III) 423(d)(1)(A) 2, 4
§ 223(d)(2)(A), 42 U.S.C. (& Supp. III) 423(d)(2)(A) 2, 4
§ 223(d)(2)(C), 42 U.S.C. (& Supp. III) 423(d)(2)(C) 2, 4
§ 223(d)(3), 42 U.S.C. 423(d)(3) 3
§ 223(d)(5)(A), 42 U.S.C. (Supp. III) 423(d)(5)(A) 9
Tit. XVI, 42 U.S.C. (& Supp. III) 1382c *et seq.*:
§ 1614(a)(3), 42 U.S.C. (& Supp. III) 1382c(a)(3) 3
§ 1614(a)(3)(A), 42 U.S.C. (& Supp. III) 1382c(a)(3)(A) 2, 4
§ 1614(a)(3)(B), 42 U.S.C. (& Supp. III) 1382c(a)(3)(B) 2, 4
§ 1614(a)(3)(G), 42 U.S.C. (& Supp. III) 1382c(a)(3)(G) 2, 4
Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 7
§ 2, 98 Stat. 1794 ..... 7, 10, 11
§ 2(d), 98 Stat. 1794 7
§ 2(d), 98 Stat. 1797-1799 8
§ 2(d)(4), 98 Stat. 1798 8
§ 3, 98 Stat. 1799 ..... 2, 8, 9, 11, 13, 14, 17, 18
§ 4, 98 Stat. 1800 ..... 9, 10, 11, 13, 14, 18

Statutes and rule – Continued: Page

20 C.F.R.:
Section 404.1520 2
Section 404.1520(c) 4
Section 404.1521 2
Section 404.1521(a) 4
Section 404. 1521(b) 4
Section 404.1529 3
Section 404.1594(f) 4
Section 416.920 2
Section 416.920(c) 4
Section 416.921 2
Section 416.921(a) 4
Section 416.921(b) 4
Section 416.929 3
Section 416.994(b)(5) 4
Fed. R. Civ. P. 23(a)(3) 9

Miscellaneous:

130 Cong. Rec. (daily ed. Sept. 19, 1984):
p. H9836 9
pp. S11454-S11455 16-17
52 Fed. Reg. 2557 (1987) 17
H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. (1984) ... 9, 17
S. Rep. 98-466, 98th Cong., 2d Sess. (1984) 9, 17
Social Security Rulings:
Ruling 82-55 .....2, 4, 5, 6, 9, 13, 16, 17
Ruling 82-58 .....3, 6, 14, 16, 17

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v.

PATRICK M. HYATT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (App. 1a-13a[1]) is reported at 807 F.2d 376. The prior opinion of the court of appeals (App. 15a-27a) is reported at 757 F.2d 1455. The opinion of the district court granting injunctive relief (App. 28a-61a) is reported at 579 F. Supp. 985, and the order of the district court certifying the class (App. 65a-71a) is unreported. The opinions of the district court awarding respondents attorney's fees and costs (App. 81a-91a, 92a-103a) are reported at 586 F. Supp. 1154 and 618 F. Supp. 227.

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[1] "App." refers to the separately bound appendix to this petition for a writ of certiorari.

JURISDICTION

The judgments of the court of appeals were entered on December 5, 1986, and the petition for rehearing was denied on February 12, 1987 (App. 14a). On May 5, 1987, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 205(g), 223(d)(1)(A), (2)(A) and (2)(C), and 1614(a)(3)(A), (B) and (G) of the Social Security Act, 42 U.S.C. (& Supp. III) 405(g), 423(d)(1)(A), (2)(A) and (2)(C), 1382c(a)(3)(A), (B) and (G); Section 3 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1799; 20 C.F.R. 404.1520, 404.1521, 416.920 and 416.921; and Social Security Ruling 82-55 are reproduced at App. 104a-121a.

STATEMENT

This is a North Carolina-wide class action brought pursuant to 42 U.S.C. 405(g) to challenge the policies of the Secretary of Health and Human Services regarding the manner in which a claimant's allegations of pain, hypertension or diabetes mellitus are evaluated in determining whether he is entitled to disability benefits under Title II or Title XVI of the Social Security Act. Although Congress ratified the general policies at issue when it enacted the Social Security Disability Benefits Reform Act of 1984, the court of appeals ordered the Secretary to reopen the claims of tens of thousands of class members who failed to pursue their administrative remedies after their claims were initially denied or who failed to seek judicial review within 60 days of the Secretary's final decision. The issues in this case are closely related to those in *Bowen* v.

Polaski, petition for cert. pending, No. 86-1617, and we therefore suggest that the petition in this case be held and disposed of as appropriate in light of the Court's disposition of *Polaski.*

A. THE STATUTORY AND REGULATORY FRAMEWORK

1. PROCEDURAL PROVISIONS

The statutory and regulatory provisions governing the four-stage administrative review process—which consists of the initial decision, reconsideration, ALJ hearing, and Appeals Council review—are described in our certiorari petition in *Polaski* (at 2-3). See also *Bowen* v. *City of New York,* No. 84-1923 (June 2, 1986), slip op. 3.

2. SUBSTANTIVE PROVISIONS

a. *Evaluation of Pain*

The Social Security Act provides that in order for a claimant to be found disabled, his impairment must "result[ ] from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. 423(d)(3), 1382c(a)(3). See *Mathews* v. *Eldridge,* 424 U.S. 319, 336 (1976). Implementing regulations provide that a claimant will not be found to be disabled under these statutory standards on the basis of his symptoms, including pain, "unless medical signs or findings show that there is a medical condition that could be reasonably expected to produce those symptoms." 20 C.F.R. 404.1529, 416.929. The Social Security Administration (SSA) elaborated upon these regulations in Social Security Ruling (SSR) 82-58, which is discussed in our certiorari petition in *Polaski* (at 4).

b. *Hypertension and Diabetes: The Severity Regulation*

The policies regarding the evaluation of hypertension and diabetes mellitus that respondents challenged in this

case were particular applications of the "severity" regulation, the validity of which is before this Court in *Bowen* v. *Yuckert,* No. 85-1409 (argued Jan. 13, 1987). The severity regulation (20 C.F.R. 404.1520(c), 416.920(c)) is part of the five-step "sequential evaluation" process that was established by the Secretary to guide the decision-maker (the state agency, the administrative law judge (ALJ), or the Appeals Council) in determining whether a claimant is disabled under the general statutory standards in 42 U.S.C. (& Supp. III) 423(d)(1)(A), (2)(A) and (2)(C), 1382c(a)(3)(A), (B) and (G). See *Yuckert* Pet. Br. 3-5; *Bowen* v. *City of New York,* slip op. 2-3.[2] An impairment is not "severe" under the regulation if it does not "significantly limit [the claimant's] physical or mental ability to do basic work activities" (20 C.F.R. 404.1521(a), 416.921(a)), which are defined to mean "the abilities and aptitudes necessary to do most jobs" (20 C.F.R. 404.1521(b), 416.921(b)). If the claimant does not have a "severe" impairment, he will be found not to be disabled, without consideration of his age, education, and work experience. 20 C.F.R. 404.1520(c), 416.920(c).

In 1982, SSA issued SSR 82-55, (reproduced at App. 115a-121a), in order to give more specific content to the severity regulation. SSR 82-55 furnished a general statement of the operation of the severity regulation, and then further explained (App. 116a):

> Throughout this period of regulatory revision, we have tried to identify medical conditions which demonstrate nonsevere impairments. Based on increasing experience and extensive consultation with disability program physicians, 20 examples of medical conditions that are not severe have now been recog-

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[2] The sequence in which the severity of the impairment is considered is now somewhat different for the evaluation of claimants who already are receiving disability benefits. See 20 C.F.R. 404.1594(f), 416.994(b)(5). See *Yuckert* Pet. Br. 4 n.1.

> nized. These 20 examples are intended to illustrate a level of impairment severity where the evaluation principle for nonsevere impairments applies. In addition, these 20 examples, while not exhaustive, represent a significant number of specific impairments that serve as guidelines on the level of impairment severity which would warrant a finding that an individual's impairment is not severe.

Among the 20 examples were (*id.* at 119a):

> Hypertension without significant organ damage [*i.e.*, damage to the heart, eyes, kidneys, or brain], current or past.

and (*id.* at 120a):

> Diabetes mellitus, adult onset, controlled on prescribed therapy, without significant end-organ damage or recent episode of acidosis.

SSR 82-55 subsequently was rescinded, in April 1985, as part of the Secretary's reevaluation of the severity step of the sequential evaluation process. App. 9a; *Yuckert* Pet. Br. 48 n.29.

B. THE PROCEEDINGS IN THIS CASE

1. This class action was brought in the United States District Court for the Western District of North Carolina on behalf of applicants for and recipients of Social Security disability benefits in North Carolina. The suit was commenced on August 5, 1983, by Patrick Hyatt as an individual action under 42 U.S.C. 405(g), following the Appeals Council's decision sustaining the termination of his disability benefits (C.A. App. 6; App. 34a). Hyatt added a class action allegation in an amended complaint filed on October 5, 1983, in which Herman Caudle and Mary Lovingood—two other claimants who had received initial decisions terminating their benefits, but whose adminis-

trative appeals were still pending before SSA—were added as named plaintiffs (C.A. App. 15).[3]

In the amended complaint, the plaintiffs contended: (i) that the Secretary could not terminate disability benefits without showing that the claimant's medical condition had improved; (ii) that SSR 82-55 unlawfully deemed hypertension and diabetes mellitus not to be disabling unless they were accompanied by end-organ damage; and (iii) that SSR 82-58 unlawfully provided that subjective complaints of pain would not be considered disabling unless supported by objective clinical findings (App. 31a-32a; C.A. App. 17, 27-28, 34). The plaintiffs alleged that SSR 82-55 and 82-58 were inconsistent with the Fourth Circuit's decisions in *Martin v. Secretary of HEW*, 492 F.2d 905 (1974), and *Myers* v. *Califano*, 611 F.2d 980 (1980), respectively, and that the Secretary therefore had "non-acquiesced" in Fourth Circuit precedent regarding the evaluation of pain, hypertension, and diabetes (App. 32a; C.A. App. 17, 27-28). In a second amended complaint, the plaintiffs subsequently contended that the Secretary also had "non-acquiesced" in *Dotson* v. *Schweiker*, 719 F.2d 80 (4th Cir. 1983), on the medical improvement issue, even though the time within which to seek review of that decision in this Court had not expired (App. 58a-59a).

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[3] There is a serious question whether Lovingood and Caudle could be regarded as proper class representatives. See also note 5, *infra*. On February 27, 1984—prior to the March 26, 1984, order in which the district court certified the class (App. 65a-71a)—the ALJ reversed the state agency's decision and found that Lovingood continued to be disabled (C.A. App. 338-341). Thus, any objection Lovingood had to the manner in which the state agency considered her allegations of pain and hypertension became moot before she was designated by the district court as a class representative. Moreover, Caudle died on October 24, 1983 (App. 35a)—which likewise was prior to the certification of the class—and on May 3, 1984, the Appeals Council reversed the ALJ's decision and held that he continued to be disabled up to the time of his death (C.A. App. 327-329).

In an opinion dated February 14, 1984 (App. 28a-61a), the district court held that the Secretary was required by the doctrine of separation of powers to apply the rulings in *Martin, Myers* and *Dotson* in reviewing the claims of *all* persons residing in the Fourth Circuit, not merely the individual claimants who were parties to those cases. In its subsequent class certification order dated March 26, 1984 (App. 65a-71a), the district court included within the class all North Carolina residents whose claims involved hypertension, diabetes or pain and whose applications were denied or whose benefits were terminated on or after September 10, 1981 (*id.* at 65a-66a). The court included these individuals in the class and ordered the Secretary to provide for the reopening and readjudication of their claims (*id.* at 68a-69a), whether or not they had ever sought administrative review of the preliminary decisions denying their claims and obtained a "final decision" by the Appeals Council, as required by 42 U.S.C. 405(g) and implementing regulations (App. 49a-54a). Moreover, contrary to the requirement of Section 405(g) that a claimant seek judicial review within 60 days of receiving notice that his claim has been disallowed, the September 10, 1981, beginning date for the class was far more than 60 days prior to October 5, 1983, when the class complaint was filed.[4]

2. While the Secretary's appeal from the district court's order was pending, Congress enacted the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794. That Act had a significant impact on all of the issues in this case.

In Section 2 of the 1984 Act (98 Stat. 1794), Congress enacted a new statutory "medical improvement" standard to govern the determination of whether a current recipient of disability benefits continues to be disabled. Section 2(d) of the 1984 Act directed that any case that was then pending

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[4] For the subclass raising the medical improvement issue, the court established a beginning date of October 6, 1982 (App. 66a).

in court and presented the medical improvement question was to be remanded to the Secretary for redetermination under the 1984 Act (98 Stat. 1797-1799). This remand requirement applied to all named and unnamed members of certified classes in pending class actions, whether or not the individual class members had personally satisfied the exhaustion and 60-day filing requirements in 42 U.S.C. 405(g). App. 18a-19a; *City of New York*, slip op. 18 n.14. Accordingly, in its initial decision in this case, rendered on March 20, 1985 (App. 16a-27a), the court of appeals ordered the district court to remand to the Secretary the cases of all of the class members whose benefits had been terminated (App. 18a-20a). That ruling was correct as regards the class members raising the medical improvement issue (see *Heckler* v. *Lopez*, 469 U.S. 1082 (1984), and *Heckler* v. *Kuehner*, 469 U.S. 977 (1984)), and it is not at issue here.[5]

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[5] As the court of appeals recognized (App. 26a), the claim of respondent Hyatt, a prior recipient of benefits, was covered by the special statutory remand provisions, and the district court in any event had already remanded Hyatt's individual claim to the Secretary (App. 63a). Lovingood and Caudle also were prior recipients whose benefits had been terminated and therefore also were covered by the special remand provision in the 1984 Act, although they already had been found disabled in the ordinary course of the administrative appeals process. See note 3, *supra*.

Section 2(d)(4) of the 1984 Act provides that the decision by the Secretary on a specially remanded case "shall be regarded as a new decision on the individual's claim for benefits" and "shall be subject to further administrative review and to judicial review only in conformity with the time limits, exhaustion requirements, and other provisions of [42 U.S.C. 405] and regulations issued by the Secretary in conformity with such Section" (98 Stat. 1798). Consistently with this requirement, the court of appeals ordered the district court to "relinquish jurisdiction" over the remanded claims and to "dismiss [those] claimants without prejudice to their right to seek timely review of the final decisions of the Secretary on remand" (App. 27a). The district court entered such an order on June 25, 1985 (App. 72a-80a). There accordingly is a substantial question whether there has been a proper representative of the remaining class members—*i.e.*, the new-applicant

In Section 3 of the 1984 Act (98 Stat. 1799), Congress enacted new statutory standards for the evaluation of pain. See 42 U.S.C. (Supp. III) 423(d)(5)(A). As the Eighth Circuit held in its first opinion in *Polaski*, Section 3 was intended to ratify the Secretary's approach to the evaluation of pain by " 'put[ting] present regulatory policy into [the] statute' " and " 'more accurately reflect[ing] current policies' " (*Polaski* v. *Heckler*, 751 F.2d 943, 950 (1984), quoting 130 Cong. Rec. H9836 (daily ed. Sept. 19, 1984) (remarks of Rep. Pickle), and H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 29 (1984)). Similarly, as we explain in *Yuckert* (Pet. Br. 27-28, 44-49; Reply Br. 6-8), Congress ratified the Secretary's "severity" regulation when it enacted Section 4 of the 1984 Act (98 Stat. 1800). The legislative history makes clear that Congress was fully aware of the further articulation of the severity policy in SSR 82-55, in which SSA, "[b]ased on increasing experience and extensive consultation with disability program physicians" (App. 116a), included hypertension and diabetes without end-organ damage among examples of impairments that had been determined to be nonsevere under SSA policy.[6]

3. In light of the intervening enactment of Section 3 of the 1984 Act, the court of appeals concluded in its March 1985 opinion that it would be improper to instruct the

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members who challenged the Secretary's standards for the evaluation of pain, hypertension, and diabetes—since June 25, 1985. There also is a substantial question whether Hyatt, who fully exhausted his administrative remedies before personally seeking judicial review, could in any event be a proper representative under Fed. R. Civ. P. 23(a)(3) of claimants who knowingly declined to pursue their administrative remedies and whose claims therefore are now barred by res judicata. See *Polaski* Pet. 15-16.

[6] The Senate and Conference Reports both refer to regulations addressing the severity policy and state that this policy is "elaborated [upon] in rulings," quoting a sentence from SSR 82-55. See H.R. Cong. Rep. 98-1039, 98th Cong., 2d Sess. 29 (1984); S. Rep. 98-466, 98th Cong., 2d Sess. 22 (1984); compare App. 118a.

Secretary to follow Fourth Circuit precedent on the pain issue when readjudicating the claims that were being remanded to him pursuant to Section 2 of the 1984 Act (App. 19a). The court of appeals likewise declined to order the Secretary to follow circuit precedent with respect to hypertension and diabetes, although the court did not rely on Congress's ratification of the severity regulation when it enacted Section 4 of the 1984 Act. Instead, the court reasoned that because Congress in 1984 had considered but declined to adopt a provision requiring the Secretary to follow a court of appeals' decision within the circuit (App. 20a & n.6, citing H.R. Conf. Rep. 98-1039, *supra*, at 36-38), a judicial order requiring that result would constitute " 'an unwarranted judicial intrusion into this pervasively regulated area' " (App. 21a, quoting *Heckler* v. *Day*, 467 U.S. 101, 119 (1984)).

The court of appeals then addressed the claims of those class members, at issue here, whose new applications for benefits had been denied. The 1984 Act did not provide for the automatic remand of such claims, as it did in Section 2 for terminated beneficiaries who raised the "medical improvement" issue. The court of appeals first held that the district court had erred in concluding that this case fell within the exception to the exhaustion requirement for "wholly collateral" issues, recognized in *Mathews* v. *Eldridge*, 424 U.S. at 330-332, and *Heckler* v. *Ringer*, 466 U.S. 602, 617-618 (1984). The court reasoned that the contention that the Secretary was applying improper standards for the evaluation of pain, hypertension and diabetes was not "wholly collateral," but rather was "inextricably intertwined" with the class members' claims for benefits (App. 22a-23a). The court also held that the 60-day suit-filing requirement in Section 405(g) is jurisdictional and that the district court therefore was without authority to include in the class any individuals who had obtained a final decision of the Secretary more than 60 days before this class action was commenced (App. 23a).

In light of the foregoing holdings, the court of appeals ordered the district court to dismiss the claims of all new-applicant class members who had not satisfied the exhaustion and 60-day filing requirements in 42 U.S.C. 405(g) (App. 23a). The court of appeals further ordered the district court to remand to the Secretary the claims of the new-applicant class members who *did* satisfy those requirements. The claims in this category that raised the pain issue were to be reconsidered under the statutory pain standard in Section 3 of the 1984 Act. Although the court was of the view that the 1984 Act did not similarly address the hypertension and diabetes standards (but see page ~~10~~ 9, *supra*), it believed that the Secretary should have an opportunity to reevaluate the remanded claims raising those issues in light of the legislative history of the 1984 Act discussing the "non-acquiescence" issue (App. 23a).[7]

4. Although the claims of the class representatives—Hyatt, Lovingood, and Caudle—were subject to the special remand provisions in Section 2 of the 1984 Act, and although the courts below had relinquished jurisdiction over such claims (see note 5, *supra*), the class representatives nevertheless petitioned for a writ of certiorari. They sought review of the court of appeals' decision insofar as it declined to order the Secretary to readjudicate the claims of the new-applicant class members

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[7] Because Sections 3 and 4 of the 1984 Act ratified the Secretary's policies regarding the evaluation of pain and non-severe impairments—and because the class members' claims therefore were properly evaluated under those policies in the first instance—there was no legal basis for the court of appeals' order requiring the Secretary to readjudicate the claims of any of these new-applicant class members. However, the Secretary elected not to petition for a writ of certiorari to review the court of appeals' original decision in that respect, since the class members who had personally satisfied the prerequisites to suit under 42 U.S.C. 405(g) comprised a very small percentage of the overall class. The readjudication of those persons' claims is now taking place.

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who had not personally satisfied the exhaustion and 60-day filing requirements in 42 U.S.C. 405(g). This Court granted that petition and remanded the case to the court of appeals for further consideration in light of *City of New York*. See *Hyatt* v. *Bowen*, No. 85-474 (June 9, 1986).

On remand, the court of appeals reversed its prior holding and ordered the Secretary to readjudicate the claims of *all* new-applicant class members, whether or not they had exhausted their administrative remedies or satisfied the 60-day limitation on judicial review (App. 1a-13a). The court first held, without elaboration, that "[t]he separation of powers doctrine requires administrative agencies to follow the law of the circuit whose courts have jurisdiction over the cause of action" (App. 4a). It then stated that here, as in *City of New York*, the legal issue involved (the Secretary's supposed "non-acquiescence" in circuit precedent) was "collateral" to the class members' claims for benefits. The court based this conclusion on the theory that the class members did not actually seek benefits from the district court, but instead "asked only that their claims for benefits be remanded to the Secretary for reconsideration in accordance with the Social Security Act as interpreted by the court of appeals for this circuit" (App. 6a). The court also expressed the view that class members would be irreparably injured if the exhaustion requirement were enforced, because claimants suffer anxiety and distress when their claims are denied and because a retroactive award of benefits might be reduced by the payment of attorney's fees (*ibid*).

The court of appeals further held that the 60-day filing period under 42 U.S.C. 405(g) should be tolled for all class members, even though the challenged policies concerning the evaluation of pain, hypertension, and diabetes were contained in published regulations and rulings and therefore were not "secret," as in *City of New York*. The

court reasoned that the Secretary had not published his policy of not following circuit precedent on those issues and that the class members "were entitled to believe that agencies charged with evaluating claims according to law had faithfully performed their duties" (App. 8a-9a).

On the merits, the court of appeals stated that Section 3 of the 1984 Act had superseded prior circuit precedent regarding the evaluation of pain (App. 9a & n.5). But the court did not explain why it nevertheless had ordered the Secretary to readjudicate all claims raising the pain issue, inasmuch as Section 3 had ratified the policies under which the claims at issue had originally been denied. Moreover, the court of appeals once again failed to discuss the impact of Section 4 of the 1984 Act on the application of the "severity" policy under SSR 82-55 to claims based on hypertension and diabetes without end-organ damage.

In the same opinion (but in a separate judgment), the court of appeals awarded respondents $204,649.90 in attorney's fees and costs under the Equal Access to Justice Act, 28 U.S.C. 2412(d) (App. 9a-12a, 92a-103a).

REASONS FOR GRANTING THE PETITION

1. The judgment of the court of appeals in this case requires the Secretary to provide for the reopening and readjudication of an estimated 80,000 disability claims that were denied as far back as 1981. There is no justification for this sweeping and unprecedented order. Each of the thousands of claimants involved received a personal notice informing him that his claim for benefits had been denied at some stage of the administrative review process and that he had 60 days within which to seek further review. Yet each such claimant declined to seek further review, thereby deliberately allowing the denial of his claim to become final and binding against him. As a result, the district court had no jurisdiction over these class members'

claims under 42 U.S.C. 405(g), and their claims are barred in any event by administrative res judicata.

Moreover, as we explain above (see page 9, *supra*) and in our certiorari petition (at 9-10, 21-22) in *Bowen* v. *Polaski*, petition for cert. pending, No. 86-1617, Congress explicitly ratified the Secretary's policies regarding the evaluation of pain under SSR 82-58 when it enacted Section 3 of the Social Security Disability Benefits Reform Act of 1984. Similarly, as we explain in our briefs (Pet. Br. 27-28, 44-49; Reply Br. 6-8) in *Bowen* v. *Yuckert*, cert. granted, No. 85-1409 (argued Jan. 13, 1987), Congress ratified the Secretary's approach to the evaluation of non-severe impairments when it enacted Section 4 of the 1984 Act. The Secretary's treatment of hypertension and diabetes is merely a particular application of that severity policy. See page 9 and note 6, *supra*. Quite aside from the prerequisites to suit under 42 U.S.C. 405(g) and the bar of res judicata, the court of appeals in this case had no authority to order the reopening and readjudication of claims that were denied under administrative standards that were valid.

The issues in this case are closely related to those presented in *Bowen* v. *Polaski*, an Eighth Circuit-wide class action in which the plaintiffs likewise challenged the Secretary's policies under SSR 82-58 regarding the evaluation of pain. Despite Congress's ratification of those policies in Section 3 of the 1984 Act, the Eighth Circuit in *Polaski* likewise ordered the Secretary to reopen and readjudicate the claims of thousands of class members who did not seek administrative review of preliminary decisions denying their claims for benefits and thereby allowed the denial of their claims to become final and binding. The Fourth Circuit's decision in the instant case strongly reinforces our submission that the Court should grant review in *Polaski*. The decision below demonstrates that the Eighth Circuit's decision in *Polaski* was not a sport, and

that the courts of appeals' misapprehension of the scope of this Court's opinion in *City of New York* has the potential to cause serious disruption of the Social Security disability programs. However, because the issues in the two cases are closely related, we suggest that the Court hold the petition in this case and dispose of it as appropriate in light of the disposition in *Polaski*.[8]

Of course, this case also involves the 60-day limitation on filing suit under 42 U.S.C. 405(g), an issue not presented in *Polaski*. However, if the Court grants the petition in *Polaski* and holds that the Eighth Circuit erred in excusing the claimants there from the jurisdictional and res judicata consequences of their failure to seek further *administrative* review of the denial of their claims within the time allowed, we believe that the Court's reasoning also would require reversal of the Fourth Circuit's holding that the class members in this case could be excused from the consequences of their failure to seek *judicial* review within 60 days. Accordingly, although we would not oppose plenary review in this case as well as *Polaski* if the Court believed that course was necessary in order to resolve the 60-day issue, we do not urge that course at this time.

2. The extraordinary reopening relief ordered by the court of appeals in this case cannot be justified on the theory that the Secretary had unconstitutionally "non-acquiesced" in Fourth Circuit precedent regarding the evaluation of pain, hypertension and diabetes. The court of appeals' reliance on this rationale in ordering the Secretary to provide for the readjudication of 80,000 claims is completely without merit for several reasons.

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[8] In addition, because the challenged approach to the evaluation of hypertension and diabetes was merely a particular application of the severity policy at issue in *Yuckert*, the Court may wish to hold the petition in this case pending the decision in *Yuckert*.

First, as we argued in the court of appeals (C.A. Br. 16-30; Jan. 1987 Reh'g Pet. 6-11), the Secretary's policies embodied in SSR 82-55 and 82-58 regarding the evaluation of pain, hypertension and diabetes were not inconsistent with the Fourth Circuit's decisions in *Martin* and *Myers*. See also *Foster* v. *Heckler*, 780 F.2d 1125, 1129 & nn. 5 and 7 (4th Cir. 1986) (Secretary's pain policy is consistent with circuit precedent). The essential premise of the court of appeals' "non-acquiescence" rationale for dispensing with the prerequisites to suit under 42 U.S.C. 405(g) therefore is without merit.

Second, the Secretary in the instant case did not formally announce that SSA would not follow a particular decision of a court of appeals. The error of the court of appeals' "non-acquiescence" analysis thus follows *a fortiori* from the *Lopez* litigation involving the "medical improvement" issue, where the Secretary had made such a formal announcement and where a majority of this Court nevertheless appeared to see no substance to the constitutional challenge to the Secretary's action. See *Heckler* v. *Lopez*, 463 U.S. 1328, 1336 (1983) (Rehnquist, Circuit Justice), motion to vacate stay denied, 464 U.S. 879 (1983); 464 U.S. at 883 (Stevens, J., concurring and dissenting). Indeed, the rigid rule of mandatory, circuit-wide acquiescence apparently contemplated by the court below is nothing more than a rule of non-mutual collateral estoppel against the Federal Government, which this Court unanimously rejected even as a non-constitutional matter in *United States* v. *Mendoza*, 464 U.S. 154 (1984). See also *United States* v. *Estate of Donnelly*, 397 U.S. 286, 294-295 (1970). The legislative history of the 1984 Act, moreover, demonstrates Congress's awareness of the litigating considerations that weigh against a rigid rule requiring the Secretary to follow circuit precedent in all circumstances. See 130 Cong. Rec. S11454-S11455 (daily ed. Sept. 19,

1984) (remarks of Sen. Dole); S. Rep. 98-466, *supra,* at 21; H.R. Conf. Rep. 98-1039, *supra,* at 37-38. Furthermore, regulations and rulings on evidentiary questions, such as SSR 82-55 and 82-58, must be sustained by the courts unless they are arbitrary and capricious, even if the courts might reach (or had reached) a different result on similar facts in the absence of such a ruling. *Heckler* v. *Campbell,* 461 U.S. 458, 466 (1983).[9]

Third, the policies respondents challenged in this case were embodied in published regulations and rulings, and therefore were not "secret," as the Secretary's policy was found to be in *City of New York*. Thus, there can be no contention in this case that the class members were somehow lulled into inaction because they were unaware of the substantive policies under which their claims were decided.

Fourth, the court of appeals expressly recognized that Section 3 of the 1984 Act has superseded prior circuit precedent regarding the evaluation of pain (App. 9a) and that, under the rule of *Bradley* v. *Richmond School Board,* 416 U.S. 696, 711-716 (1974), and *United States* v. *Schooner Peggy,* 5 U.S. (1 Cranch) 102, 110 (1801), Section 3 must be applied to claims pending in the courts

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[9] As we explain in our post-argument brief in *Yuckert* (at 3-5 & nn. 2 and 3), the Secretary has now instituted new procedures to assess adverse appellate decisions and formally to determine whether SSA will follow them within the circuit. To date, SSA has issued 28 rulings stating that it will follow particular adverse appellate decisions at all four levels of the administrative review process when reviewing claims filed by persons residing in the circuit involved; by contrast, it has issued no rulings declining to apply circuit precedent at all four levels. Moreover, SSA has instituted procedures to govern any situation in the future in which it might seek to relitigate in a particular circuit a legal issue that previously was decided adversely to the Secretary by the court of appeals. See App. 94a; 52 Fed. Reg. 2557 (1987) (proposed regulations); *Stieberger* v. *Heckler,* 615 F. Supp. 1315, 1403-1405 (S.D.N.Y. 1985), preliminary injunction vacated, 801 F.2d 29 (2d Cir. 1986).

(App. 19a). Section 3 in turn ratified the Secretary's prior administrative policies regarding the evaluation of pain. See page 9, *supra*. Accordingly, even if the court of appeals, prior to passage of the 1984 Act, might properly have ordered the readjudication of claims on the basis of a finding that the Secretary had failed to follow circuit precedent, it had no authority to order that readjudication after Section 3 of the 1984 Act superseded the very circuit precedent in which the Secretary supposedly had "non-acquiesced." For similar reasons, the court had no authority to order readjudication of claims based on hypertension and diabetes, since Congress approved the severity policy in Section 4 of the 1984 Act.

3. In the same opinion (but in a different judgment), the court of appeals awarded respondents $204,649.90 in attorney's fees and costs under the Equal Access to Justice Act (EAJA) (App. 9a-13a). The court justified its award in part on the ground that respondents were "prevailing parties" under its opinion on remand from this Court, an opinion that ~~which~~ greatly expanded the class of claimants whose claims must be readjudicated (App. 10a). If, as we urge herein, this Court vacates the court of appeals' judgment ordering that readjudication, the court of appeals' separate judgment affirming the award of attorney fees should be reexamined as well.

In addition, the court of appeals' holding that the Secretary's position on the merits was not "substantially justified" cannot be reconciled with Congress's approval of the Secretary's pain and severity policies. Moreover, insofar as the court perceived an alleged failure to follow circuit precedent (rather than the substance of the pain and severity policies) to be the relevant issue, its conclusion that the Secretary's position was not substantially justified is inconsistent with the court of appeals' first decision in this very case, which excluded the class members at issue

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here from reopening relief despite allegations of "non-acquiescence." The court's holding in this respect is also inconsistent with this Court's order refusing to vacate the Circuit Justice's order granting a stay of reopening relief in *Lopez* (discussed at page 16 *supra*), despite similar allegations. Related issues regarding the "substantially justified" standard under EAJA are presented in *Pierce* v. *Underwood,* cert. granted, No. 86-1512 (May 18, 1987). Questions concerning the propriety of awarding attorney's fees at rates in excess of the $75 per hour cap under EAJA are also presented both here (see App. 12a, 85a, 88a) and in *Underwood.* For these reasons, even if the Court were to deny the instant petition on the first question presented, the petition should be held and disposed of as appropriate in light of the decision in *Underwood* insofar as the EAJA issue is concerned.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition of the certiorari petition or the decision in *Bowen* v. *Polaski,* petition for cert. pending, No. 86-1617, and the decisions in *Bowen* v. *Yuckert,* cert. granted, No. 85-1409, and *Pierce* v. *Underwood,* cert. granted, No. 86-1512.

Respectfully submitted.

CHARLES FRIED
Solicitor General

MAY 1987

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No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

PATRICK M. HYATT, ET AL

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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TABLE OF CONTENTS

	Page
Appendix A (court of appeals' opinion dated 12/5/86)	1a
Appendix B (court of appeals' order denying rehearing dated 2/12/87)	14a
Appendix C (court of appeals' decision dated 3/20/85)	15a
Appendix D (district court's decision dated 2/14/84)	28a
Appendix E (district court's judgment dated 2/14/84)	62a
Appendix F (district court's certifying order dated 3/26/84)	65a
Appendix G (district court's amended order dated 6/25/85	72a
Appendix H (district court's amended order dated 5/8/84)	81a
Appendix I (district court's order dated 9/11/85)	92a
Appendix J (statutory and regulatory provisions involved)	104a
Appendix K (social security ruling)	115a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 84-1381 and 85-2240

PATRICK H. HYATT; HERMAN O. CAUDLE AND MARY P. LOVINGOOD, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES, APPELLEES,

v.

MARGARET M. HECKLER, OR HER SUCCESSOR IN OFFICE, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

PATRICK H. HYATT SSN: 248-50-1848; HERMAN O. CAUDLE; MARY P. LOVINGOOD ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES, APPELLEES,

v.

MARGARET HECKLER, OR HER SUCCESSOR IN OFFICE, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

Submitted Oct. 6, 1986
Decided Dec. 5, 1986

Before RUSSELL and HALL, Circuit Judges, and BUTZNER, Senior Circuit Judge.

BUTZNER, Senior Circuit Judge:

The Supreme Court vacated the judgment of this court[1] and remanded this class action for further consideration in

[1] *Hyatt v. Heckler*, 757 F.2d 1455 (4th Cir.1985), *vacated and remanded sub nom. Hyatt v. Bowen*, ____ U.S. ____, 106 S.Ct. 2886, 90 L.Ed.2d 974 (1986).

light of *Bowen v. City of New York*, ____ U.S. ____, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986). The remand requires us to reconsider issues arising out of the Social Security Administration's policy of declining to apply the law of this circuit to disability claims involving diabetes mellitus, hypertension, and pain. We now affirm those provisions of the district court's judgment that remanded to the Secretary of Health and Human Services the disability claims of the members of subclasses who had not exhausted their administration remedies or sought judicial review within 60 days of an adverse administrative decision.[2] Affirmance overrules that part of our judgment which directed the district court to dismiss these claims. *See* 757 F.2d at 1460-61 (Part II). We also affirm the district court's award of attorney fees, which we had previously vacated. In all other respects we reinstate our prior judgment.

I

Bowen v. City of New York approved waiver of exhaustion of administrative remedies and tolling of the 60-day filing requirement for a class of claimants suffering from mental illness. Relying on unpublished internal memoranda that mandated a presumption inconsistent with established regulations, the Social Security Administration had denied benefits to mentally ill persons who were not aware of the basis of the agency's decisions. *See* 106 S.Ct. 2032. The Secretary contends that the claimants' mental impairment was the critical factor justifying waiver and tolling. He argues that consequently *Bowen v. City of New York* is not applicable to the case before us, and he urges us to reinstate our initial judgment.

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[2] The district court's opinions are reported as *Hyatt v. Heckler*, 579 F.Supp. 985, and 586 F.Supp. 1154 (W.D.N.C.1984).

Although waiver of the exhaustion requirement and tolling of the period of limitation will rarely be appropriate, we are not persuaded by the Secretary's argument that the principles the Supreme Court explained must be confined to claims involving mental impairments. The criteria that the Court specified are necessarily restrictive. Nevertheless, they may be applied to comparable agency procedures that are unlawfully imposed on a class of claimants.

Bowen v. City of New York establishes that exceptional circumstances may justify waiver of the requirement imposed by 42 U.S.C. § 405(g) that a claimant must exhaust all administrative remedies by obtaining a final decision from the Secretary before seeking judicial review. After a person has presented a claim for benefits to the Secretary, exhaustion of administrative remedies may be excused if the claim is collateral to the claim for benefits, the claimants would be irreparably harmed, and relief is consistent with policies underlying the exhaustion requirement. *See* 106 S.Ct. at 2031-33. The Court cautioned that waiver would not be available if a claimant alleges mere deviation from applicable regulations in particular administration proceedings. As the court emphasized, exhaustion is not to be excused by every allegation of irregularity in the agency proceedings. 106 S.Ct. at 2032.

The Court also held that the provision of section 405(g) requiring a claimant to commence a civil action for judicial review within 60 days of a final decision is a period of limitation subject to equitable tolling. 106 S.Ct. at 2029-31. This decision overrules those parts of *Hyatt v. Heckler*, 757 F.2d at 1460-61, *Hunt v. Schweiker*, 685 F.2d 121, 123 (4th Cir.1982), and *Teague v. Califano*, 560 F.2d 615, 618 (4th Cir.1977), that held the 60-day requirement to be jurisdictional.

II

Martin v. Secretary of Health, Education and Welfare, 492 F.2d 905, 909 (4th Cir.1984), held that end organ damage is not a prerequisite to the establishment of disability from hypertension or diabetes. *Myers v. Califano*, 611 F.2d 980, 981-82 (4th Cir.1980), held that administrative law judges should evaluate the effect of pain on a claimant's ability to work when the pain results from a medically diagnosed physical ailment even though the pain's intensity is shown only by subjective evidence.

The separation of powers doctrine requires administrative agencies to follow the law of the circuit whose courts have jurisdiction over the cause of action. In the absence of a controlling decision by the Supreme Court, the respective courts of appeals express the law of the circuit. *See PPG Industries, Inc. v. NLRB*, 671 F.2d 817, 823 n. 9 (4th Cir.1982).

On the basis of ample evidence the district court found that the Secretary instructed the North Carolina disability determination service and administrative law judges to follow the Secretary's regulations instead of circuit court decisions which conflict with the Secretary's interpretation of the Social Security Act. Also, the Secretary directed administrative law judges not to cite conflicting court decisions. 579 F.Supp. at 993-996.[3] The Secretary's policy of nonacquiescence in the law of the circuit is well documented, and it has been the subject of congressional criticism. *See Hyatt v. Heckler*, 757 F.2d at 1459-60; H.R.Rep. 1039, 98th Cong., 2d Sess. 36-38, *reprinted in*

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[3] The Supreme Court and the district court have described the administrative procedures for determining disability claims. *See Bowen v. City of New York*, 106 S.Ct. at 2024-26; *Hyatt v. Heckler*, 579 F.Supp. at 992-93.

1984 U.S. Code Cong & Admin.News 3038, 3096.[4] The district court found, citing examples, that the Social Security Administration had applied the policy of nonacquiescence to members of several subclasses by failing to apply the law of the circuit in evaluating diabetes, hypertension, and pain.

In regard to hypertension and diabetes claimants, the Secretary's regulation SSR 82-55 prevented state employees from making any attempt to determine an individual's actual capacity to perform work. The district court also found that a number of claimants were denied a complete evaluation of their actual ability to engage in substantial gainful activity solely because of the Secretary's regulation SSR 82-58. State employees and physicians applying this regulation found claimants who suffered from medically diagnosed ailments not disabled because their subjective complaints of pain, no matter how severe or disabling, were not fully supported by objective clinical findings. 579 F.Supp. at 993-94.

Again citing examples, the district court found that both initial claimants and those whose benefits had been terminated suffered irreparable harm because the Social Security Administration failed to apply the law of the circuit. The district court found that the unjustified denial of benefits deprived many claimants of necessities and caused them to suffer anxiety, depression, and decline in health. 579 F.Supp. at 995.

The district court held that subclasses of claimants who had been denied benefits because the Social Security Ad-

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[4] Other cases criticizing the Secretary's nonacquiescence policy are *Stieberger v. Bowen*, 801 F.2d 29, 32-33 (2d Cir.1986); *Anderson v. Heckler*, 756 F.2d 1011, 1013 (4th Cir.1985); *Layton v. Heckler*, 726 F.2d 440, 442 (8th Cir.1984); *Lopez v. Heckler*, 725 F.2d 1489, 1497, 1503 (9th Cir.1984) *vacated on other grounds and remanded, Heckler v. Lopez*, 469 U.S. 1082, 105 S.Ct. 583, 83 L.Ed.2d 694 (1984); *Childress v. Secretary of Health and Human Services*, 679 F.2d 623, 630 (6th Cir.1982).

ministration had declined to apply the law of the circuit were entitled to have their claims reconsidered by the agency. It included in its remand to the Secretary members of the subclasses who had not exhausted their administrative remedies or who had not sought judicial review within 60 days. *See* 579 F.Supp. at 996-99.

III

In this action, as in *Bowen v. City of New York*, the claim is collateral to the claims for benefits. The class neither sought nor obtained benefits in the district court. Instead, they asked only that their claims for benefits be remanded to the Secretary for reconsideration in accordance with the Social Security Act as interpreted by the court of appeals of this circuit.

The claimants would be irreparably injured if the exhaustion requirements were enforced against them. Evidence supports the district court's findings of the claimants' anxiety and distress. Moreover, as the district court noted, even if a claimant persevered through the administrative proceedings, retained a lawyer, and succeeded in obtaining from a district court a ruling consistent with the law of the circuit, the award would likely be diminished by allowance of a fee of as much as 25%. Thus, retroactive benefits are not fully compensatory. *See* 579 F.Supp. at 995, 998.

For reasons similar to those explained in *Bowen v. City of New York,* the relief granted by the district court is consistent with the policies underlying exhaustion. The court made no awards. It allowed the agency to determine each claimant's eligibility for benefits. *See* 106 S.Ct. 2032.

The Court's observation in *Bowen v. City of New York*, 106 S.Ct. at 2032, applies to this case: "We should be especially sensitive to this kind of harm where the government seeks to require claimants to exhaust administrative remedies merely to enable them to receive the procedure

they should have been afforded in the first place." The district court's reasoning is consistent with the analysis of the issue in *Bowen v. City of New York*, and its findings of historical fact are not clearly erroneous. We therefore conclude that the district court's judicial waiver of the exhaustion of administrative remedies satisfies the critera prescribed by the Supreme Court.

IV

Bowen v. City of New York explains that equitable tolling of the 60-day requirement is justified "where consistent with congressional intent and called for by the facts of the case." 106 S.Ct. at 2029. Although the Secretary usually retains authority to determine tolling, a court may act "where the equities in favor of tolling the limitations period are 'so great that deference to the agency's judgment is inappropriate.' " 106 S.Ct. at 2030. The Court held that tolling is consistent with congressional intent in enacting the Social Security Act. 106 S.Ct. at 2030. The question remains whether the equities of this case warrant tolling.

The equities justifying tolling are similar to those the Supreme Court identified. The Court explained that claimants "who permitted their administrative or judicial remedies to expire were entitled to believe that their Government's determination of ineligibility was the considered judgment of an agency faithfully executing the laws of the United States." 106 S.Ct. at 2030.

State or federal administrative agencies notified the *Hyatt* claimants that their applications for benefits had been denied. But the agencies did not tell the claimants that the Secretary's interpretation of the Social Security Act, rather than the court of appeal's interpretation, was the basis for denial. Nor did the agencies inform the claimants that the employees who denied their claims should have followed the law of the circuit in evaluating

their disabilities. In these respects the claimants' plight was similar to that of the claimants in *Bowen v. City of New York* to whom the Court referred, quoting with approval the Second Circuit's opinion:

> "Though they knew of the denial or loss of beneifts, they did not and could not know that those adverse decisions had been made on the basis of a systematic procedural irregularity that rendered them subject to court challenge. Where the Government's secretive conduct prevents plaintiffs from knowing of a violation of rights, statutes of limitations have been tolled until such time as plaintiffs had a reasonable opportunity to learn the facts concerning the cause of action. Since in this case the full extent of the Government's clandestine policy was uncovered only in the course of this litigation, all class members may pursue this action notwithstanding the 60-day requirements."

106 S.Ct. at 2030.

The Secretary protests, however, that the nonacquiescence policy was not a secret because both the regulations dealing with hypertension, diabetes, and pain and the decisions explaining the law of the circuit were published. Therefore, the Secretary says, *Bowen v. City of New York* provides no precedent for this case.

We cannot accept the Secretary's argument. The Secretary never published the agency's informal policy of not following the law of the circuit with respect to hypertension, diabetes, and pain. On the contrary, as the district court found, the Secretary directed administrative law judges not to cite the conflicting court decisions. *See* 579 F.Supp. at 996. The effect of the unpublished nonacquiescence policy on North Carolina clamants was not disclosed until this case was tried. *See* 579 F.Supp. 993-94.

The evidence did not reveal mere irregularities or errors in individual cases. Instead, it depicted a systematic, unpublished policy that denied benefits in disregard of the

law. It is unrealistic to believe that publication of both the agency's regulations and the court of appeals' decisions would alert lay persons to the Secretary's nonaquiescence in circuit law. The *Hyatt* claimants, no less than those in *Bowen v. City of New York*, were entitled to believe that agencies charged with evaluating claims according to law had faithfully performed their duties.

V

The claimants also request affirmance of the injunctive relief the district court granted. The Secretary has responded by pointing out that this request is outside the scope of the Supreme Court's remand.

Because *Bowen v. City of New York* does not deal with injunctive relief, we agree with the Secretary that the remand does not embrace this issue. Moreover, an injunction is unnecessary. After the district court decided this case, the Secretary "obsoleted without replacement" SSR 82-55 which had conflicted with the law of the circuit regarding diabetes and hypertension. *See* SSR 85-III-II (1985). Therefore, on remand claims involving these impairments will be evaluated in accordance with the law of the circuit. Claims involving pain will be evaluated in accordance with section 3(a) of the Benefits Reform Act of 1984, 42 U.S.C. § 423(d)(5)(A).[5]

VI

Invoking the Equal Access to Justice Act, 28 U.S.C. § 2412, the district court awarded attorneys' fees in the amount of $187,299.30 and reimbursement for expenses of $7,598.00. The court fully explained the reasons for

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[5] *Hyatt v. Heckler*, 757 F.2d at 1458-59, explains that the statutory pain standard enacted by Congress supersedes the law of the circuit for the purposes of remand of pending claims.

the award in *Hyatt v. Heckler*, 586 F.Supp. 1154 (W.D.N.C. 1984), and its order entered September 10, 1985. The Secretary asserts that counsel are not entitled to any fees or reimbursement because the claimants are not prevailing parties and the Secretary's position was substantially justified. In any event, the Secretary argues, the award is too high.

The Secretary's contention that the claimants have not prevailed is premised on our initial decision. *See* Secretary's Brief on Remand p. 17. We have modified that decision, and there now can be no doubt that the claimants are the prevailing parties. As events have unfolded, the denial of injunctive relief is of little moment. Without the injunction the claimants have achieved their principal goal of reconsideration of their claims. Furthermore, even before the Supreme Court's remand, other class members prevailed on significant issues. On the basis of the Secretary's most recent census approximately 2,200 initial applicants are entitled to relief because of this case. This figure will undoubtedly be increased by affirmance of the district court's judgment on the exhaustion of administrative remedies and tolling issues. Not all these claimants will ultimately succeed in obtaining benefits. But they have succeeded in having their claims evaluated free of the Secretary's nonacquiescence policy. This result, of course, was the goal of the class action.

We also reject the Secretary's argument that the class of terminated claimants obtained relief by congressional enactment and not as a result of this action. Indeed, by the terms of the 1984 Act, were it not for this class action, only the named plaintiffs would have received the benefit of Section 2 of the Act.[6]

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[6] Social Security Disability Benefits Reform Act of 1984, Pub.L. No. 98-460, 98 Stat. 1797-98 (1984), 42 U.S.C. § 423 note (Supp.1986).

The Supreme Court has approved a "generous formulation" to determine who are prevailing parties: "[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). Applying this criterion, we conclude that the claimants are prevailing parties.

We also conclude that the Secretary's position was not substantially justified. The primary issue, on which the outcome of the case depended, was the Secretary's policy of nonacquiescence in the law of the circuit. In *Anderson v. Heckler*, 756 F.2d 1011 (4th Cir.1985), we held that Secretary's policy of nonacquiescence entitled the claimant to attorney's fees. *Anderson* affords sound precedent, and we perceive no factual or legal ground for departing from it.[7]

After the district court awarded attorney fees, the Supreme Court decided in *Pennsylvania v. Delaware Valley Citizen's Council*, ____ U.S. ____, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986), that an allowance based on the reasonable hourly rate for a lawyer's services normally precludes enhancing the fee for the superior quality of performance. Relying on the Supreme Court's ruling, the

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[7] *Chilicky v. Schweiker*, 796 F.2d 1131, 1137-38 (9th Cir.1986), on which the Secretary relies, provides no reason for denying attorney fees. *Chilicky* granted immunity from damages to the Secretary and other federal and state officials who administered the social security disability program. Granting immunity in *Chilicky* does not establish that the Secretary's position in *Hyatt* was substantially justified within the meaning of the Equal Access to Justice Act. The Secretary has cited no authority, nor has he called our attention to any legislative history, that discloses congressional intent to make an award of attorney fees dependent on the responsible officials' lack of qualified immunity.

Secretary contends that the district court erred by allowing four lawyers fees based on an hourly rate of $95.

The Secretary's reliance on *Delaware Valley* is misplaced. That case dealt with the allowance of a fee pursuant to the Clean Air Act, 42 U.S.C. § 7604(d), which provides simply that the fee be "reasonable." In contrast, the district court's allowance of fees is authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A), which specifies the principal elements of a reasonable fee as follows:

> [A]ttorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justified a higher fee.

The district court properly applied the statute. Although expert testimony disclosed that the prevailing hourly rate in the community for comparable federal litigation was about $125, the district court reduced the rate to $75. Taking judicial notice of statistics that the Secretary does not question the court adds a cost of living allowance of $8, bringing the rate to $83. An enhancement of $12 brought the rate to $95 based on the court's finding that lawyers with the expertise of claimants' counsel "are not readily available." 586 F.2d at 1158. This finding satisfies the "special factor" recognized in § 2412(d)(2)(A) as a justification for increasing the basic $75 rate.

The district court's award is not excessive. We find no error of fact or law and affirm the fee and expense award for reasons adequately stated by the district court in its opinion, 586 F.Supp. 1154, and its order of September 11, 1985. On remand the district court should remove the 5% discount that it imposed as a result of our previous remand. The court should also award a reasonable fee for counsel's appellate services.

VI

In summary, we affirm that part of the judgment of the district court that judicially waived the exhaustion of administrative remedies, tolled the period of limitation, and remanded the claims of designated subclasses to the Secretary. We also affirm the district court's allowance of attorney's fees and expenses. In all other respects we reinstate our prior judgment. The case is remanded for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1381
No. 85-2240

PATRICK H. HYATT; ET AL, APPELLEES,

v.

MARGARET M. HECKLER, ETC., APPELLANT.

On Petition for Rehearing with Suggestion for Rehearing In Banc.

FILED FEB. 12, 1987

ORDER

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Butzner, with the concurrence of Judge Russell and Judge Hall.

For the Court,

/s/ JOHN M. GREACHEN
John M. Greachen
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1381

Patrick H. Hyatt: Herman O. Caudle and Mary P. Lovingood, on behalf of themselves and all others similarly situated, North Carolina Department of Human Resources, Disability Determination Services,

Appellees,

vs.

Margaret M. Heckler, or her successor in office, Secretary of the United States Department of Health and Human Services

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge. (C/A 83-655)

Argued: June 7, 1984 Decided: March 20, 1985

No. 84-1695

Patrick H. Hyatt; Herman O. Caudle and Mary P. Lovingood, on behalf of themselves and all others similarly situated, North Carolina Department of Human Resources, Disability Determination Services,

Appellees,

-v-

Margaret M. Heckler, or her successor in office, Secretary of the United States Department of Health and Human Services,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge. (C/A 83-655).

Submitted: August 9, 1984 Decided: March 20, 1985

Before RUSSELL and HALL, Circuit Judges, and BUTZNER, Senior Circuit Judge.

BUTZNER, Senior Circuit Judge:

The Secretary of Health and Human Services appeals from the district court's order enjoining the Secretary to cease her policy of not following the decisional law of this circuit regarding the initiation and termination of disability benefits. The Secretary also assigns error to the district court's certification of a class whose claims are to be reopened and readjudicated in accordance with the standards laid down by this circuit.[1] In a related appeal, the Secretary questions the award of attorneys' fees.

After the parties argued this appeal, Congress enacted the Social Security Disability Benefits Reform Act of 1984, which became effective October 9, 1984.[2] The parties' supplemental briefs disclose that many of the issues raised on appeal have been affected significantly by the new legislation. Furthermore, *Heckler v. Day*, 104 S. Ct. 2249 (1984), and *Heckler v. Ringer*, 104 S. Ct. 2013 (1984), which were decided after entry of the district court's order, provide controlling precedent for aspects of this legislation. The 1984 Act and the recent Supreme Court opinions require us to vacate the district court's judgment and remand the case.

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[1]The district court's opinion is reported as *Hyatt v. Heckler*, 579 F. Supp. 985 (W.D.N.C. 1984). The district court subsequently revised the published draft of the certification order. The revised subclasses are: initial claimants who allege disability from diabetes or hypertension, A(1)(a), or pain, A(1)(b); claimants whose benefits were terminated, A(2) and B.

[2]Pub. L. No. 98-460, 98 Stat. 1794 (1984).

I.

Terminated Benefits

The district court directed the Secretary to adjudicate the termination of benefits in accordance with circuit precedent.[3] It certified subclasses of North Carolina residents who were entitled to this relief.

We conclude that the 1984 Act controls the claims of all members of the subclasses who assert that their benefits have been terminated unlawfully. Section 2 of the 1984 Act deals with the issue of medical improvement and prescribes the standard of review for the termination of disability benefits. These standards are broad enough to encompass all impairments or combination of impairments, whether physical or mental, that provided the basis for the initial award of benefits.

Section 2(d) of the Act deals with class actions relating to medical improvement pending, as this one was, on September 19, 1984, for judicial review of the termination of benefits. This section provides that the claims of named class members are to be remanded to the Secretary for adjudication in accordance with the provisions of the Act. Also, the claims of unnamed class members are to be remanded to the Secretary, who is directed to notify them of their right to request administrative review.

The government protests that some subclass members whose benefits were terminated are not entitled to a remand because they have not satisfied the requirements of section 205(g) of the Social Security Act, 42 U.S.C. §405(g). This attack on the district court's certification order, however, does not survive the enactment of the 1984 legislation. By directing remand of cases pending September 19, 1984, the

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[3] *See Dotson v. Schweiker*, 719 F.2d 80 (4th Cir. 1983); *Myers v. Califano*, 611 F.2d 980 (4th Cir. 1980); *Martin v. Secretary*, 492 F.2d 905 (4th Cir. 1974).

Act created an exception to the normal exhaustion requirements for actions, such as this, relating to medical improvement. The import of this provision was explained by Senator Dole:

> The effective date provision does, however, permit all class members of certified class actions to seek review of their cases under the medical improvement standard established by this act, even where they may not have pursued their appeal rights in accordance with section 205 and the Secretary's regulations.

130 Cong. Rec. S11454 (daily ed. Sept. 19, 1984).

Members of one of the subclasses, whose benefits are subject to termination, insist that they are entitled to have claims involving pain evaluated by the Secretary on remand according to this circuit's case law.[4] This contention is foreclosed by section 3(a) of the 1984 Act which prescribes an interim statutory standard for the evaluation of pain in all determinations made prior to January 1, 1987. Because their cases were pending when the 1984 legislation was enacted, the new statutory standard is applicable to their claims. *See Bradley v. Richmond School Board*, 416 U.S. 696, 711-16 (1974); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 102, 110 (1801). Contrary to the claimant's contention, they have no vested constitutional right to have their claims evaluated by standards that were in effect prior to the 1984 Act. *See Richardson v. Belcher*, 404 U.S. 78, 80-81 (1971).

Another subclass included claimants whose benefits were terminated because the Secretary did not follow this circuit's precedent for evaluating hypertension or diabetes mellitus.[5] The district court, concluding that this policy of nonacquiescence was unlawful, required the Secretary to follow circuit precedent with regard to these impairments.

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[4] *See Myers v. Califano*, 611 F.2d 980 (4th Cir. 1980).

[5] *See Martin v. Secretary*, 492 F.2d 905 (4th Cir. 1974).

Congress is aware of the Secretary's policy of nonacquiescence. As proposed by the House, the 1984 Act would have required the Secretary to acquiesce or petition for certiorari. The Senate bill would have required the Secretary to report her decisions of nonacquiescence to the Congress and to print her explanation in the Federal Register.[6]

The conferees deleted both the House and the Senate provisions, but they did not intend that deletion should be interpreted as approval of nonacquiescence. On the contrary, they noted that questions had been raised concerning the constitutionality of nonacquiescence, as well as the application of the policy, even if constitutional. "By refusing to apply circuit court interpretations and by not promptly seeking review by the Supreme Court, the Secretary forces beneficiaries to re-litigate the same issue over and over again in the circuit, at substantial expense to both beneficiaries and the federal government. This is clearly an undesirable consequence." Conference Report at 38, 130 Cong. Rec. at H9831. The conferees reaffirmed that Congress intended the Secretary to resolve policy conflicts promptly to assure uniform administration of the program. This objective, they pointed out, may be achieved by diligently pursuing appeals or by seeking a legislative remedy.[7] The conferees urged "that a policy of non-acquiescence be followed only in situations where the Administration has initiated or has the reasonable expectation and intention of initiating the steps necessary to receive a review of the issue in the Supreme Court." Conference Report at 37, 130 Cong. Rec. at H9831.

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[6]*See* H.R. Rep. No. 1039, 98th Cong., 2d Sess. 36-38, *reprinted in* 130 Cong. Rec. H9831 (daily ed. Sept. 19, 1984) (hereinafter cited as Conference Report).

[7]Also, section 10 of the Act directs the Secretary to establish pursuant to the Administrative Procedure Act uniform standards for determining disability.

When the Conference Report is read in conjunction with *Heckler v. Day*, 104 S. Ct. 2249 (1984), it becomes apparent that the injunction must be vacated. In *Day*, the Court vacated an injunction entered in a class action requiring the Secretary to adjudicate all claims and pay benefits within specified times. The Court held that the injunction was "an unwarranted judicial intrusion into this pervasively regulated area . . . . " 104 S. Ct. at 2258. Its opinion rested to a great extent on Congress's rejection of legislation imposing mandatory deadlines on disability reviews.

The controversy over nonacquiescence presents an analogous situation. The conferees deleted a provision of the House bill that would have required acquiescence in circuit precedent in the absence of appeal. *See* Conference Report at 37, 130 Cong. Rec. at H9831. Following the reasoning of *Day*, we cannot approve an injunction imposing the same restraints that Congress rejected.

Vacating the district court's injunction does not leave claimants without a remedy. In the unlikely event that the Secretary spurns the Conference Report, the district courts reviewing the Secretary's decision are bound to apply circuit precedent construing the Social Security Act. But this review would be long and wasteful to the claimant and the government. Both the district court and the conferees spoke forcefully to avoid the harm and extravagance of the policy of routine nonacquiescence. The Secretary should not deem vacation of the injunction as approval of the policy.

We decline the claimants' request that we instruct the district court to retain jurisdiction for review of the Secretary's orders on remand terminating disability. Section 2(d)(4) provides that the Secretary's decision of a remanded case shall be regarded as a new decision subject to review only in conformity with section 205 of the Social Security Act. Section 2(d)(5) prohibits certification of a class relating to medical improvement after September 19, 1984. These

provisions persuade us that Congress intended that judicial review of remanded cases should not be the subject of a class action. Individual review provides an adequate remedy.

We direct the district court to remand to the Secretary the claims of the named plaintiffs and the unnamed class members designated in subclasses A(2) and B, except those whose claims have been mooted by award of benefits *pendente lite*. After remand to the Secretary, the district court should relinquish jurisdiction over the claims of the plaintiffs and unnamed class members.

II.

Initial Benefits

We find merit in the government's challenge to the district court's jurisdiction over some members of the subclasses composed of claimants for initial benefits. The 1984 Act did not provide initial claimants the same right of reconsideration that it granted claimants whose benefits were terminated. Initial claimants, therefore, must be limited to those who meet the requirements of section 205(g) of the Social Security Act, 42 U.S.C. §405(g). *Califano v. Yamasaki*, 442 U.S. 682, 698-701 (1970).

Ordinarily section 405(g) requires exhaustion of administrative remedies before a claimant can seek judicial review. The Court has recognized an exception to this requirement for a claimant who has presented to the Secretary a claim that raises a legal issue wholly collateral to a claim for benefits and who has made a colorable showing that his injury cannot be remedied if exhaustion is required. *Mathews v. Eldridge*, 424 U.S. 319, 326-32 (1976). The district court applied this exception to the general rule and held that exhaustion of remedies was not required.

In *Heckler v. Ringer*, 104 S. Ct. 2013, 2023 (1984), the Court held that a claim that the Secretary was applying an improper standard for entitlement was not wholly collateral

to a claim for benefits. Consequently, exhaustion was required. Here, too, the claims that the Secretary has applied improper standards with respect to pain, diabetes, and hypertension are inextricably intertwined with claims for benefits within the meaning of the exhaustion requirement of section 405(g) as interpreted by the Supreme Court in *Ringer*. Consequently, exhaustion of administrative remedies is necessary for members of the subclasses composed of claimants of initial benefits.

Section 405(g) also requires a claimant to file an action for judicial review within 60 days after the Secretary's final decision. In this circuit, the 60-day requirement is considered to be jurisdictional, and unnamed class members are not exempt from compliance. *Hunt v. Schweiker*, 685 F.2d 121 (4th Cir. 1982). We cannot accept the suggestion that we should overrule *Hunt*, for, as a panel of the court, we lack authority to do this.

On remand, we direct the district court to dismiss the initial claims for disability of class members who have not exhausted their administrative remedies or who have not sought timely judicial review of the Secretary's final decision. The district court should remand to the Secretary all initial claimants in subclasses A(1)(a) and (b) who have satisfied the requirements of section 405(g). Those who raise the issue of pain should be reconsidered by the Secretary in the light of the interim statutory pain standard of section 3(a) of the 1984 Act for the reasons we stated in Part I.

The Act does not address the diabetes and hypertension standards. Nevertheless, we will not assume that the Secretary will disregard the views expressed in the Conference Report about the Secretary's policy of nonacquiescence in circuit law. The Secretary should have an opportunity to reconsider these claims in light of circuit precedent and the legislative history of the 1984 Act. The claimants are entitled

to a decision on this issue, so, if necessary, they can seek review on an unequivocal administrative record.

After remand, the district court should relinquish jurisdiction over the members of these subclasses for reasons mentioned in Part I. Section 405(g) provides an adequate procedure for judicial review of individual claims in each of the three districts of North Carolina where the claimants reside.

III.

Identification of Unnamed Class Members

The district court's order provided for identification of, and notice to, unnamed class members. Section 2(d) of the 1984 Act supersedes the district court's directions to the Secretary with respect to class members whose benefits were terminated.

The district court should amend its order and notice with respect to claimants for initial benefits by providing that the Secretary should identify and notify those members of subclasses A(1)(a) and (b) who have met the requirements of §405(g).

IV.

Mandamus

The appellees contend that the court had mandamus jurisdiction over the claims of all plaintiffs under 28 U.S.C. §1361. They argue that this independent ground obviates the need to satisfy the jurisdictional prerequisites of §405. In *Heckler v. Ringer*, 104 S. Ct. at 2022, the Court noted that mandamus would issue only to a plaintiff who had exhausted all other avenues of relief, and only if the defendant owed the plaintiff a clear nondiscretionary duty. The Court concluded that §405(g) provided an adequate remedy for challenges to the Secretary's denial of claims including

objections based on the Secretary's policies. For these reasons, we hold that mandamus is inappropriate. *See also Starnes v. Schweiker*, 748 F.2d 217 (4th Cir. 1984).

V.

Intervention

The district court allowed the North Carolina Department of Human Resources, Disability Determination Services to intervene pursuant to Rule of Civil Procedure 24(b). The department's complaint challenges the Secretary's policy of nonacquiescence in Fourth Circuit precedent in the same areas as the class action. It seeks declaratory and injunctive relief prohibiting the Secretary from following this policy in North Carolina. The department claims standing to sue because of its role in administering the disability program and as *parens patriae*. The Secretary contends that the department lacks standing.

Ordinarily, rule 24(b) authorizes a district court to permit an agency to intervene in an action that involves a statute that it administers. But in this instance, which involves the standards the Secretary uses for determining disability benefits, sections 405(g) and 405(h) limit actions against the Secretary to an individual who seeks review of a final decision made after a hearing to which he was a party. In *Lowther v. Montgomery County*, 561 F.2d 1120 (4th Cir. 1977), we held that neither a county nor an unincorporated association was an individual entitled to sue under §405(g). The department's function of determining disability does not distinguish its situation from the plaintiffs' in *Lowther*. A claim of standing analogous to the department's was rejected in *D'Amico v. Schweiker*, 698 F.2d 903 (7th Cir. 1983). There administrative law judges who sought to challenge the Secretary's instruction pertaining to the repayment of Social Security benefits were denied standing to sue. The beneficiaries — not the adjudicators — are the proper parties to

seek review under section 405(g). *Lowther* and *D'Amico* foreclose the department's standing in its own right.

The department also lacks standing to sue the federal government in its capacity as *parens patriae*. With respect to a citizen's rights in relation to the federal government, the United States — not the state — occupies the status of *parens patriae*. *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923).

On remand, the district court should dismiss the department's complaint in intervention.

VI.

Attorneys' Fees

The Secretary has appealed the district court's order awarding attorneys' fees (No. 84-1695). We vacate the award and remand this issue to the district court for reconsideration in light of this opinion.

VII.

Summary

On remand, we direct the district court to take the following action:

1. Vacate its order of injunctive and declaratory relief, except as provided in paragraph 5 below.

2. Remand to the Secretary for reconsideration pursuant to the Social Security Disability Benefits Reform Act of 1984 the claims of named parties and unnamed members of subclasses A(2) and B whose benefits were terminated, except those who have been granted awards *pendente lite*.

3. Dismiss the claims of initial claimants in subclasses A(1)(a) and (b) who have not met the requirements of section §405(g).

4. Direct the Secretary to identify and notify claimants for initial benefits in subclasses A(1)(a) and (b), who meet the requirements of §405(g), in accordance with procedures and a notice prescribed by the district court.

5. Remand to the Secretary for reconsideration pursuant to the interim pain standard of section 3(a) of the 1984 Act the claims of initial claimants in subclass A(1)(b) who have met the requirements of section 405(g).

6. Remand to the Secretary for reconsideration of her policy of nonacquiescence in light of the 1984 Act's legislative history and circuit precedent the claims of initial claimants in subclass A(1)(a) who have met the requirements of §405(g).

7. After remand, relinquish jurisdiction of all remanded claims and dismiss the claimants without prejudice to their right to seek timely review of the final decisions of the Secretary on remand in their respective judicial district pursuant to §405(g).

8. Dismiss the complaint in intervention of the North Carolina Department of Human Resources, Disability Determination Services.

9. Reconsider the award of attorneys' fees in light of this opinion.

The judgments in 84-1381 and 84-1695 are vacated, and the cases are remanded. Each party shall bear its own costs.

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-83-655-M

PATRICK H. HYATT; HERMAN O. CAUDLE and MARY P. LOVINGOOD, on behalf of themselves and all others similarly situated,

Plaintiffs,

and

NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES,

Plaintiff-Intervenor,

-vs-

MARGARET M. HECKLER, or her successors in office, Secretary of the United States Department of Health and Human Services,

Defendant.

FINDINGS OF FACT CONCLUSIONS OF LAW AND DECISION THAT THE UNITED STATES SECRETARY OF HEALTH AND HUMAN SERVICES SHOULD

(1) STOP *DENYING* CLAIMS FOR SOCIAL SECURITY DISABILITY BENEFITS BASED ON HYPERTENSION OR DIABETES MELLITUS UPON THE THEORY THAT WITHOUT END-ORGAN DAMAGE (TO HEART, EYES, KIDNEYS OR BRAIN) THE CLAIMANT DOES NOT HAVE A "SEVERE IMPAIRMENT"

(2) STOP *DENYING* CLAIMS FOR SOCIAL SECURITY DISABILITY BENEFITS BASED ON PAIN, UPON THE THEORY THAT SUBJECTIVE MANIFESTATIONS OF PAIN CANNOT BE CONSIDERED DISABLING UNLESS THEY ARE SUPPORTED BY OBJECTIVE CLINICAL FINDINGS

(3) STOP *TERMINATING* SOCIAL SECURITY BENEFITS WITHOUT SUBSTANTIAL EVIDENCE THAT THE RECIPIENT'S DISABILITY HAS CEASED

— ALL OF WHICH THE SECRETARY PERSISTS IN DOING, IN CONSCIOUS AND WILFUL DISREGARD OF PERTINENT AND CONTROLLING DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH JUDICIAL CIRCUIT OF THE UNITED STATES.

INDEX

	Page
FINDINGS OF FACT	1
I. THE PARTIES AND THE ISSUES	1
II. CASE HISTORIES OF THE INDIVIDUAL PLAINTIFFS AND OTHERS	
(a) Patrick H. Hyatt	4
(b) Herman O. Caudle	7
(c) Mary P. Lovingood	10
(d) Other Representative Class Members	11
III. HOW SOCIAL SECURITY CLAIMS ARE HANDLED; REVIEW AND TERMINATION, 1982-84 STYLE	13
Background	13
Procedure	15
Terminations	19
Irreparable Harm	21
The Moratorium	22
The Secretary's Position	23
CONCLUSIONS OF LAW	25
I. DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION	25
II. THE SUBSTANTIVE LEGAL MERITS OF THE CASE	33
DECISION	41

FINDINGS OF FACT

I.

The Parties and the Issues

1. This is a class action against the Secretary of the United States Department of Health and Human Services, challenging the policy of the Social Security Administration (SSA) denying Social Security benefits and terminating Social Security benefits, in the cases described below, in open violation of applicable decisions of the Fourth Circuit Court of Appeals.

2. The individual plaintiffs and class members are applicants for or former recipients of disability benefits under Titles II and XVI of the Social Security Act, 42 U.S.C. §§401 *et seq;* 1381 *et seq.* The North Carolina Department of Human Resources, Disability Determination Services (DDS), has been authorized to intervene as a party plaintiff. *See, Nuesse v. Camp,* 385 F.2d 694 (D. C. Cir. 1967); Fed. R. Civ. P. 24(a); (b).

3. Plaintiffs contend that the Secretary, acting pursuant to an express policy of refusal to comply with federal circuit court decisions with which she disagrees, has promulgated standards of eligibility for disability benefits which directly contradict controlling decisions of the Fourth Circuit Court of Appeals.

4. First, plaintiffs contend that the Secretary's regulation SSR 82-55 disregards the Fourth Circuit's holding in *Martin v. Secretary of Department of Health, Education and Welfare,* 492 F.2d 905 (4th Cir. 1974), by requiring that medical impairments such as diabetes mellitus and hypertension shall not be considered disabling unless they are accompanied by end-organ damage (*i.e.*, damage to heart, eyes, kidneys or brain).

5. Second, plaintiffs contend that the Secretary's regulation SSR 82-58 disregards the Fourth Circuit's holding in

Myers v. Califano, 611 F.2d 980 (4th Cir. 1980), by providing that subjective manifestations of pain shall under no circumstances be considered disabling unless they are substantiated by objective clinical findings.

6. Finally, plaintiffs contend that the Secretary's regulations SSR 82-49c and SSR 81-6 disregard the holding of *Dotson v. Schweiker*, 719 F.2d 80 (4th Cir. 1983), by providing that a person currently receiving benefits is not entitled to a presumption of continuing disability, and may be found to be no longer disabled, despite the absence of evidence that the recipient's condition has changed for the better since the date when he or she was last determined to be disabled.

7. Plaintiffs have argued that SSA's policy of "non-acquiescence" is contrary to the Social Security Act; to the separation of powers doctrine; to principles of *res judicata*, *stare decisis*, and collateral estoppel; to the due process and equal protection guarantees of the Fifth Amendment to the United States Constitution; and to the Administrative Procedure Act. They seek both declaratory and injunctive relief requiring the Secretary to adhere to the decisions of the Fourth Circuit Court of Appeals in determining eligibility for Social Security disability payments.

8. Pursuant to specific orders of court dated December 16, 1983, and January 13, 1984, all issues were consolidated under Rule 65(a)(2), and the case was heard on January 18, 1984, on (1) defendant's motion to dismiss; (2) plaintiffs' motion for injunctive relief; (3) plaintiffs' motion for class certification; and (4) the merits of the case. The court received all competent evidence offered on all issues by all parties.

II.
Case Histories of the Individual Plaintiffs

(a) Patrick H. Hyatt

9. Plaintiff Patrick Hyatt is 47 years old, has a tenth grade education, and last worked in 1973 as a long haul truck driver. He lives in Mecklenburg County, North Carolina, with his wife and two daughters. Between 1969 and 1974 plaintiff underwent a series of back operations, including several lumbar laminectomies with removal of ruptured intervertebral discs. Since the time of his original surgery, plaintiff has suffered from continuous, disabling back and leg pain.

10. On January 7, 1974, plaintiff was found by the Social Security Administration to be disabled due to degenerative disc disease, post-lumbrosacral fusion problems, and depressive reaction. He received Social Security disability benefits from March, 1973, until September, 1981.

11. On September 10, 1981, DDS notified Hyatt that his disability had ceased during July, 1981; his benefits were terminated. DDS did not inform Hyatt that his condition had improved since he was last determined by SSA to be totally disabled. On October 5, 1981, plaintiff requested reconsideration of this decision. On January 8, 1982, after reconsideration, DDS upheld its original decision, informing Hyatt that although he suffered from "discomfort," he did not suffer from objective physical impairments that would prevent him from doing work activity.

12. On December 10, 1982, Mr. Hyatt received a hearing before a Social Security Administration administrative law judge (ALJ). At the hearing, plaintiff testified that his severe pain precluded him from engaging in even the slightest exertional activities; this evidence was substantiated by witnesses. In connection with the hearing, the ALJ received as evidence numerous reports rendered by plaintiff's regular treating physician, Dr. Jerry M. Petty, a neurosurgeon.

Among his other findings, Dr. Petty stated that "Mr. Hyatt is totally and permanently disabled for any type work and has been for quite some time." Tr. 160. Dr. Petty's reports following Mr. Hyatt's frequent visits throughout the past ten years document Hyatt's continuing and severe pain.

13. The ALJ also considered a report made by Dr. Ronald C. Demas, to whom plaintiff was referred for a consultive examination by DDS. Dr. Demas diagnosed plaintiff as suffering from probable chronic low back strain, post laminectomy changes. Tr. 148. Dr. Demas does not appear to have considered the disabling effects of plaintiff's subjectively experienced pain.

14. On January 7, 1983, the ALJ rendered his decision. He determined that plaintiff's back condition constituted a severe impairment, but stated that plaintiff retained the residual functional capacity to preform sedentary work. The ALJ did not accord plaintiff a presumption of continuing disability, and he did not make any finding whether plaintiff's condition had improved since he was last found disabled.

15. In his decision, the ALJ took notice of plaintiff's severe pain, but found that it was not disabling. The ALJ stated that Dr. Petty was "overly impressed with the claimant's complaints of pain," and stated that the job of SSA was to determine whether a claimant is disabled "on the basis of medical evidence and other findings." Tr. 23-24. The ALJ then proceeded to find that Hyatt's pain is not disabling when he limits his physical exertion. There is *no* evidence in the file to support this finding.

16. On June 2, 1983, the SSA Appeals Council denied review of the ALJ decision. Following that action, plaintiff instituted this suit to review the Secretary's final decision pursuant to 42 U.S.C. §405(g).

17. At the trial, Mr. Hyatt testified that his disability benefits amounted to $425 per month before they were terminated. Since the payments were terminated, plaintiff has received no income for himself. He receives $202 per month in AFDC payments to provide support for his two children, and the family also receives food stamps. The family's monthly rent is $175.

18. Mr. Hyatt and his family have experienced severe financial distress since his benefits were terminated. Mr. Hyatt was forced to sell his home because he fell behind on the mortgage payments, and a number of his personal possessions, including an automobile and two chairs, have been repossessed by the finance company. Mr. Hyatt testified that he has fallen behind on a number of bills, including all the utility bills; the family has been unable to buy clothing, or to afford a diet that includes meat.

(b) *Herman O. Caudle*

19. Plaintiff Herman O. Caudle was 56 years old at the time this suit was filed. He had a 10th grade education, and had worked in the past as a salesclerk, night watchman, and maintenance man. Until the time of his death on October 24, 1983, Mr. Caudle lived with his wife in Winston-Salem, North Carolina.

20. SSA originally found that Mr. Caudle was entitled to a period of Social Security disability benefits beginning in May, 1981, due to hypertension, control less than satisfactory, with Grade II retinopathy, exogenous obesity, passive-dependent personality, and depressive reaction with sleep disorder. The evidence before the court established also that Mr. Caudle weighed about 270 pounds, and suffered for a period of years from hypertension which his doctors were unable to control through medication. Exh. 25, p. 4; Exh. 11, p. 1.

21. In March, 1983, DDS informed Mr. Caudle that his disability had ended. DDS affirmed its initial determination upon reconsideration. Plaintiff Caudle then requested a hearing before an ALJ. A hearing was held on August 17, 1983, and on August 24, 1983, the ALJ issued his decision that Mr. Caudle was no longer disabled because he did not suffer from a "severe impairment."

22. In reaching his decision, the ALJ did not accord Caudle a presumption of continuing disability, and did not make any finding that Caudle's condition had improved since he was last found by SSA to be disabled.

23. The ALJ found from the evidence before him that Caudle suffered from hypertension, under less than satisfactory control with Grade II-III retinopathy, but he found that Caudle suffered from no end-organ damage (*i.e.*, damage to eyes, heart, kidneys, or brain).

24. The ALJ further found that plaintiff's subjective complaints were not substantiated by objective clinical findings.

25. On October 21, 1983, Mr. Caudle filed a timely request with the Appeals Council for review of the ALJ's decision; three days later he was dead, apparently from the hypertension and other ailments which had disabled him for several years.

26. Counsel for plaintiffs introduced the affidavit of plaintiff Caudle's regular treating physician, Dr. Mary Fennell Lyles, assistant professor of internal medicine at Bowman Gray School of Medicine. Dr. Lyles, who treated Caudle from 1979 until his death in 1983, discussed the severity of Caudle's hypertension, which she stated showed no medical improvement, and in fact showed a progressive deterioration, despite a course of aggressive therapy. She also stated:

"Anxiety, depression, and financial stress all further complicated management of Mr. Caudle's blood pressure. I attribute a large portion of this emotional distress to worry over his benefit status, especially since May of 1983." Exh. 11, p. 1.

27. Dr. Lyles further stated that Dr. Joyce Reynolds, medical examiner at Forsyth Memorial Hospital, had reported her opinion that Mr. Caudle had died a cardiac death as a complication of his hypertension. Dr. Lyles supported the finding of Dr. Reynolds with her own opinion that "Mr. Caudle's disabling condition, severe hypertension, led to aggravation of his angina and eventually to myocardial infarction which was the probable cause of death." Exh. 11, p. 2.

28. Dr. Lyles added that she had attempted to hospitalize Mr. Caudle before his death, to perform intensive diagnostic procedures. Mr. Caudle had refused hospitalization due to a lack of insurance coverage and the threatened loss of his disability benefits. Dr. Lyles concluded that her patient "did not receive optimal treatment because his benefits were cut off." Exh. 11, p. 3.

29. Counsel for plaintiffs also introduced the affidavit of Herman Caudle's widow, Mary Devers Caudle. Mrs. Caudle stated in her affidavit that Mr. Caudle's physical condition had not improved, but instead had continued to decline, from the time when he was originally awarded disability benefits. Additionally, she stated, Mr. Caudle grew very worried and upset about the termination of his benefits, spending more and more time alone in his room, and causing Mrs. Caudle great concern. Mrs. Caudle stated her belief that "worrying about Social Security shortened Herman's life." Exh. 10, p. 2.

(c) *Mary P. Lovingood*

30. Plaintiff Mary Lovingood is 57 years old, and cannot read or write. In the past she worked as a pie maker and a

poultry cleaner. She lives with her husband in Charlotte, North Carolina.

31. SSA originally found that Ms. Lovingood was disabled due to chest pain, high blood pressure, and back and leg pain. Lovingood received Social Security disability benefits from 1974 until October, 1983. Her benefits were terminated pursuant to a notice by DDS in August, 1983, that she was no longer disabled.

32. In the explanation accompanying the notice of termination sent to Ms. Lovingood, DDS stated:

> "Although you may have pain in your back and legs at times, the report show [sic] that you are able to stand, walk, and use your legs in a normal manner.

The explanation further stated:

> "Although your blood pressure is higher than normal, it has not damaged your heart, kidneys or eyes [end-organs]."

Exh. 25, p. 2.

33. DDS did not accord Ms. Lovingood a presumption of continuing disability based on her prior entitlement to benefits, nor did it make any finding that her condition had improved since she was initially found to be disabled.

34. On September 1, 1983, Ms. Lovingood requested reconsideration of the DDS decision and her request was denied. She then filed a request for a hearing before an ALJ on October 15, 1983. Apparently, that request is still pending.

35. Ms. Lovingood's affidavit was received in evidence. In her affidavit, plaintiff states that her condition has *not* improved since SSA originally found that she was disabled. In addition, Ms. Lovingood states that she has grown anxious and depressed since learning that her disability benefits would be terminated. The termination of Ms. Lovingood's benefits reduced her family income by approximately 30 per

cent: she and her husband now live on his income of $530 per month, and will experience difficulty in paying the costs of their food, rent, utilities, insurance, and medical bills. Ms. Lovingood did not elect to continue receiving her disability payments pending appeal of her case to an ALJ, because she was afraid she would be unable to repay SSA if she ultimately lost her case.

(d) *Other Representative Class Members*

36. Affidavits of several declarants were received in evidence. From these affidavits and other evidence, the court finds the following facts:

37. SSA has engaged in a consistent practice of terminating Social Security disability benefits without making any finding that a recipient's condition has improved since he or she was originally determined to be disabled. Exhs. 8-24.

38. The loss of Social Security benefits often causes former recipients to suffer severe financial hardship. Many former recipients have become completely dependent on others, such as the public welfare system, private charities, or their children, for support. Still others have suffered the loss of their homes (Exh. 16); their utilities (Exh. 19); or their automobiles (Exh. 13).

39. The termination of benefits to disabled persons whose conditions have not changed has often resulted in the inability of these persons to secure proper medical treatment for the very conditions from which they are disabled, or other conditions. Exh. 20 (claimant in debt for medicine); Exh. 14 (inability to purchase medicine); Exh. 13 (appointments with private treating physician no longer affordable); Exhs. 14, 16 (eye examinations and glasses not affordable); Exh. 21 (needed dental treatments cancelled).

40. Persons whose disability benefits are terminated without any demonstration that their conditions have improved often experience deep emotional distress due to resultant

financial pressures, which tends only to aggravate the severity of their physical or emotional disabilities. Exhs. 17-20; 23.

41. On several known occasions, former recipients of disability benefits have died, shortly after their benefits were terminated without any showing of improvement, from the very conditions which SSA had determined were not disabling severe impairments. Exhs. 15, 17, 18, 24.

III.
How Social Security Claims are Handled; Reviews and Terminations, 1982-84 Style.

Background

42. Title II of the Social Security Act provides for disability insurance benefits (SSDI) for disabled workers. 42 U.S.C. §401 *et seq.* SSDI benefits are based upon an individual's earnings record and are paid without regard to financial need. Title XVI of the Social Security Act provides for supplemental income (SSI) for persons who are both poor and disabled. 42 U.S.C. §1381 *et seq.* SSI benefits are paid to eligible poor persons whose income and resources fall below a certain level.

43. The *disability* standards for both the SSDI and SSI programs are identical. Disability is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve (12) months." 42 U.S.C. §423 (d)(1)(A); §1382 (c)(a)(3)(A).

44. The Social Security Administration (SSA), pursuant to contract, has entrusted initial disability determinations to the North Carolina Department of Human Resources, Disability Determination Services (DDS). In making disability

determinations, DDS, the state agency, follows, and is only authorized to follow, disability standards promulgated by the federal agency, SSA. These standards are established by directives in the Programs Operation Manual System (POMS) utilized by DDS employees, and in various SSA rulings (SSRs) and policy statements.

45. An initial claimant for disability benefits will be referred to DDS, the state agency, for review. If the claim is denied, the claimant may request reconsideration by DDS. If the claim is still denied, the claimant may request a hearing before a federal SSA Administrative Law Judge (ALJ). A claimant who receives an adverse decision from an ALJ may appeal the decision to the SSA Appeals Council. Finally, a claimant who is denied benefits by the Appeals Council may seek relief from that decision by suing in federal court. 42 U.S.C. §405 (g).

46. A claimant who is found disabled at any stage of this procedure is entitled to benefits. However, a person is eligible for benefits only as long as the disability continues. A recipient of disability benefits is subject to a "continuing disability investigation" (CDI) at least once every three years. 42 U.S.C. §421 (h)(1).

47. The procedure for review of eligibility for benefits and possible termination is essentially similar to the procedure followed in initial applications for benefits. *See* 20 C.F.R. §404.900 *et seq.*; §416.901 *et seq.* A recipient is contacted by DDS and told that his or her case is being reviewed to determine whether he or she is still disabled. If DDS determines that the recipient is no longer disabled, DDS sends the recipient a letter informing him or her of the determination; SSA terminates payments of benefits shortly thereafter. A recipient may request reconsideration from DDS, and may seek further review of a termination of benefits from (in turn) an ALJ, the Appeals Council, and the federal courts.

(An SSI recipient need not seek reconsideration from DDS, but instead may appeal directly to an ALJ.)

48. Persons whose benefits have been terminated are currently offered the option of continuing to receive benefits pending appeal at the ALJ level. 42 U.S.C.A. §423(g)(1) (West Supp. 1983) ("aid paid pending" program). However, if the ALJ affirms the termination, all benefit payments are terminated, and the benefits paid pending appeal may be considered overpayments subject to recoupment by the Secretary of Health and Human Services.

Procedure

49. The Secretary develops guidelines for substantive disability determinations. These guidelines are published as Social Security regulations, 20 C.F.R. §400 *et seq.*; Social Security rulings (SSRs); and Programs Operating Manual Systems (POMs). They are used as a controlling reference by DDS (state) and SSA (federal) employees who perform disability evaluations upon claimants.

50. Under the contract between the SSA and North Carolina, the North Carolina Department of Human Resources, Disability Determination Services, makes initial disability determinations both for new applicants and for those recipients whose continuing disability status is reviewed. The state employees are controlled by the federal regulations in making disability determinations and may not vary from them. If, for example, a DDS consulting physician expresses the opinion that a claimant is disabled, that opinion will be rejected by the state and federal examiners unless the medical impairments fit precisely within the guidelines established by the defendant.

51. SSA and DDS employees who evaluate claims for disability payments are charged with the duty of determining whether a claimant suffers from a "severe impairment" which limits the claimant's ability to engage in, or wholly

prevents a claimant from engaging in, substantial gainful activity.

52. SSA has published SSR 82-55, which is the same document as POM 2107. These documents are entitled, "Medical Impairments That Are Not Severe." According to these documents SSA has determined that the following impairments are not "severe," and thus not disabling:

> ¶4a. Hypertension without significant organ damage, past or present.
>
> ¶7.[a]. Diabetes mellitus, adult onset, controlled on prescribed therapy, without significant end-organ damage or recent episodes of acidosis.

These regulations are codified in 20 C.F.R. Subpart P, Appendix 1, §4.00 C, which states:

> *Hypertensive vascular disease* does not result in severe impairment unless it causes severe damage to one or more of four end-organs: heart, brain, kidneys, or eyes (retinae).

53. DDS employees who evaluate the condition of disability claimants automatically determine that individuals who suffer from hypertension or diabetes mellitus are not disabled from those illnesses, unless those individuals also suffer from clinically substantiated end-organ damage. In such cases, DDS employees do not make any attempt to determine an individual's actual ability to perform work.

54. The Secretary offered no evidence to indicate that either diabetes mellitus or hypertension is not disabling unless it has already resulted in end-organ damage.

55. Carl Young, Supervisor of the Quality Assurance Unit of DDS, testified at the trial and submitted an affidavit which supports his testimony. Mr. Young supervised an evaluation of a random sample of 407 cases closed by DDS in late December, 1983. The closed cases included those of original applicants whose claims for benefits were denied,

and cases of former recipients whose benefits were terminated. From this evaluation, Mr. Young determined that 15 percent of all denials in the sample involved either hypertension or diabetes mellitus without any significant end-organ damage. From all of the testimony, the court finds that a substantial number of persons in North Carolina have been denied a complete evaluation of their actual ability to perform substantial gainful activity, solely because their illnesses have not yet resulted in significant damage to their eyes, kidneys, hearts or brains.

56. Symptoms, including pain, must be strictly judged by a guideline (SSR 82-58 and POM 2205) entitled "Evaluation of Symptoms":

> "POLICY STATEMENT: *Symptoms will not have a significant effect on a disability determination or decision unless medical signs or findings show that a medical condition is present that could reasonably be expected to produce the symptoms which are alleged or reported.* However, once such a medical condition (e.g., disc disease) is objectively established, the symptoms are still not controlling for purposes of evaluating disability. *Clinical and laboratory data and a well-documented medical history must establish findings which may reasonably account for the symptom in a particular impairment.* Objective clinical findings which can be used to draw reasonable conclusions about the validity of the intensity and persistence of the symptom and about its effect on the individual's work capacity must be present. For example, in cases of back pain associated with disc disease, typical associated findings are muscle spasm, sensory loss, motor loss, and atrophy. There must be an objective basis to support the overall evaluation of impairment severity. *It is not sufficient to merely establish a diagnosis or a source for the symptom.*" [Emphasis added.]

57. DDS employees who evaluate the condition of disability claimants do not consider subjective claims of pain which seem to them to be disproportionate to the clinical medical evidence before them. These employees disregard

statements by the individual being evaluated concerning the severity or intensity of his or her pain, unless those statements are supported by objective clinical findings.

58. Dr. George M. Cooper, a medical consultant for DDS, testified — and the court finds — that chronic severe pain may limit a claimant's functional capacity to a greater extent than would be indicated by objective clinical findings alone. An evaluating physician may be convinced, on the basis of his or her professional judgment and an analysis of all the evidence, that a claimant is totally disabled, yet the physician may be required by the Secretary's regulations to find the claimant not disabled due to a lack of objective clinical findings to support the claimant's complaints of pain.

59. Carl Young (see ¶55, above) further testified that 16.4 percent of all the denials of benefits evaluated by his office in late December, 1983, involved claims of significant pain, the intensity of which was not supported by objective clinical findings. From this testimony the court finds that a significant number of persons in North Carolina have been denied a complete evaluation of their actual ability to engage in substantial gainful activity solely because their subjective complaints of pain, no matter how severe or disabling, were not fully supported by objective clinical findings.

Terminations

60. The Secretary has admitted, in SSRs 81-6, 82-64 and 82-49c, and through testimony in this court, that she does not comply with the mandate of the Fourth Circuit in *Dotson V. Schweiker*, 719 F. 2d 80 (4th Cir. 1983), and that SSA continues to terminate disability benefits without any demonstration that the recipient's condition has improved since the time that he or she was originally found disabled.

61. Since October 5, 1981, in North Carolina, DDS has adjudicated approximately 165,000 claims, of which approximately 99,000 were denials or terminations. During 1983,

prior to September 7, 1983, DDS had terminated the Social Security disability benefits of approximately 106 North Carolinians per week. The total number of terminations since October 15, 1981, is approximately 15,000.

62. Aileen Webster, witness for the plaintiffs, testified. She also filed an affidavit which contains the substance of her oral testimony. That affidavit is as follows:

I, Aileen Webster, being duly sworn, aver and say:

1. I have been employed by Disability Determination Services ("DDS") for the past 18 years, serving as a disability specialist, a supervisor and, for the last five years, as a section chief.

2. In connection with my duties as Section Chief, I directed a review of the files of those 821 recipients who, as of approximately November 1, 1983, would have been terminated for medical reasons but for the moratorium. Specifically, I instructed supervisors to review the medical evidence available at the time each such claim was initially allowed and the medical evidence currently available with respect to each such claim and to determine, using common sense guidelines, whether there had been any medical improvement. On the basis of that review, the supervisors reported to me that *60.2% of the recipients who would be terminated for medical reasons under the present guidelines had not experienced any medical improvement in their condition.* [Emphasis added.]

This 12 day of January, 1984.

/s/ Aileen Webster

63. The court finds the facts to be as the above evidence tends to show: Large numbers (whether 60.2% or somewhat more or less) of the persons undergoing review of disability under the Secretary's present guidelines are being cut off the Social Security rolls without eivdence that their conditions have improved and without any presumption that their disabilities continue. Those persons would continue to draw benefits if the Secretary were following relevant decisions of the Fourth Circuit Court of Appeals.

Irreparable Harm

64. The termination and the unjustified denial of Social Security disability benefits cause irreparable harm to eligible persons. Many become unable to pay for medicines, clothing, food, fuel, transportation and shelter. Termination and denial of benefits cause anxiety, depression and decline in health. Some former recipients have died following termination of benefits; posthumous reinstatement after appeal doesn't help them.

65. If the Social Security Administration were to provide DDS with the files of disability claimants who reside in North Carolina, DDS employees would be able to determine by reviewing the files whether they showed (a) hypertension or diabetes mellitus without significant end-organ damage; (b) a subjective claim of disabling pain unsupported by objective clinical medical findings; or (c) a termination of benefits without any evidence that a claimant's condition had improved since he or she was last found disabled. The court is satisfied from the evidence that the work and expense necessary to locate and reevaluate the files of those affected will produce no serious hardship upon the state or federal administrators.

The Moratorium

66. On September 7, 1983, James M. Hunt, Jr., the Governor of North Carolina, was sufficiently concerned about the terminations of disability benefits payments in North Carolina that he issued Executive Order No. 97 entitled "Moratorium on Terminating Social Security Disability Benefits." Temporarily, such terminations have ceased.

67. In addition, the Social Security Administration on December 7, 1983, ordered a nationwide temporary halt of terminations of benefits due to Congress' failure to extend certain provisions of section 2, P.L. 97-455, which has expired. Nevertheless, in both North Carolina and the rest of

the nation, disability termination *decisions* are still being made at a rapid rate; the temporary nationwide halt only relates to *notifications to individuals* that their eligibility for benefits has ceased. Benefits are still being paid to those who are considered no longer eligible, but those payments could be terminated any day at the discretion of the Governor or the Secretary. Moreover, North Carolina residents whose benefits were terminated pursuant to SSA's policies *prior to September 7, 1983*, are not eligible to receive benefits under the Governor's order, and the cases of others who have filed claims to have their benefits restored are currently wending their way through the lengthy DDS and SSA appeals process.

The Secretary's Position

68. The Secretary of HHS accepts the decision of no court short of the Supreme Court as precedent binding on her. She views decisions of the United States circuit courts and district courts as binding only on the litigants involved in a case, and not as precedent which she must follow in other similar cases. When a conflict arises between the decisions of lower courts and the opinions of the Secretary, the Secretary considers herself entitled to follow her own interpretations of the Social Security Act rather than those rendered by lower courts.

69. The Secretary has instructed all administrative law judges handling Social Security disability cases to make "reasonable efforts" to follow district or circuit court decisions regarding *procedural* or *evidentiary* matters. However, SSA has instructed its ALJs that when district court or circuit court decisions *interpreting the Act, Social Security regulations, or SSA rulings* conflict with the Secretary's interpretations, the ALJs should not consider these court decisions binding in future cases and should not cite such lower court decisions in their opinions. ALJ decisions relying on federal case law are often reversed by the SSA Appeals Council for that reason. ALJs have been informed that "the federal

courts do not run SSA's programs." Associate Comm'r., Office of Hearings and Appeals, *Memorandum to Administrative Law Judges* (January 7, 1982).

70. The Secretary's refusal to comply with court decisions with which she disagrees is a continuing policy from which SSA deviates only by publishing new regulations and rulings that conform to judicial precedent. 1-161, *SSA Precedents.*

CONCLUSIONS OF LAW

I.

Defendant's Motion To Dismiss For Lack Of Jurisdiction.

71. Defendant has moved to dismiss the complaints with respect to all named and class plaintiffs except Mr. Hyatt, on grounds that the court lacks subject matter jurisdiction over the actions with respect to these claims. Defendant relies on 42 U.S.C. §405(g), which provides in pertinent part:

> "Any *individual*, after any *final decision* of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow." [Emphasis added.]

72. Despite its literal language, the relief afforded by this statute is not confined to individual Social Security claimants who file individual suits in district courts. The Supreme Court has held that §405(g) provides an appropriate jurisdictional basis for claims challenging the constitutionality of provisions of the Social Security Act. *Weinberger v. Salfi*, 422 U.S. 749 (1975). The Court has also held that this statute provides jurisdiction over a claim challenging SSA's procedures. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Finally, the Court has held that §405(g) permits federal courts to entertain class actions and to grant injunctive relief. *Califano v. Yamasaki*, 442 U.S. 682 (1979).

73. Defendant claims that only plaintiff Hyatt has received a "final decision" of the Secretary which this court has the authority to review under the statute, in that his is the only claim that has been presented to the SSA Appeals Council for review. The "final decision" requirement of §405(g) consists of two elements. The first element, which is purely jurisdictional in the sense that it cannot be waived, is the requirement that a claim for benefits shall have been presented to the Secretary. The second element, which can be waived either overtly or constructively by the Secretary, is the requirement that the administrative remedies be exhausted. *Matthews v. Eldridge*, 424 U.S. at 328; *Weinberger v. Salfi*, 422 U.S. at 763-64; *Aldrich v. Schweiker*, 555 F. Supp. 1080, 1087 (D. Vt. 1982).

74. The first, non-waivable, element of the finality requirement of §405(g) has been satisfied with respect to the claims of all the named and proposed class plaintiffs. The named plaintiffs have all presented claims for benefits to the Secretary. The class proposed includes only those claimants who (a) have presented initial claims for benefits or who, (b) by joining in the proposed class or otherwise, will have notified the Secretary that they believe their benefits should not be terminated. *See, Mathews V. Eldridge, supra*, at 323-24, 329 (jurisdictional requirement satisfied by answering state agency questionnaire, and by writing letter in response to tentative determination of disability cessation); *Mathews v. Diaz*, 426 U.S. 67, 75 (1976) (claim filed with Secretary by Espinosa, *after* he had joined in District Court suit, satisfied jurisdictional requirement); *Kennedy v. Harris*, 87 F.R.D. 372, 376 (S.D. Cal. 1980) (mere termination of benefits fulfills requirement of presenting a claim).

75. The Secretary's claim that only she may waive the §405(g) formal prerequisite to suit was rejected by the Supreme Court when it stated:

> *Salfi* suggested that under §405(g) the power to determine when finality has occurred ordinarily rests with the Secretary since ultimate responsibility for the integrity of the administrative program is [hers]. But cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate."

Mathews v. Eldridge, 424 U.S. at 330.

76. In *Mathews v. Eldridge*, the Supreme Court established a method for determining whether a court may infer waiver of the Social Security Act's exhaustion requirement. First, a court may infer waiver when the plaintiff's claim is entirely collateral to his individual claim for benefits. 424 U.S. at 330-31. Further, the exhaustion requirement may be deemed waived when the damages upon which a plaintiff's claim for relief is based are of such a nature that he cannot adequately be compensated by the relief that would accrue from a judicial proceeding following exhaustion. *Id.* at 331. Finally, federal courts have held that exhaustion may be inferred when the Secretary's position with respect to the litigant's claim is so fixed that further pursuit of administrative remedies would be futile. *Weinberger v. Salfi, supra*, at 767; *Liberty Alliance of the Blind v. Califano*, 568 F.2d 333, 345 (3d Cir. 1977).

77. Plaintiffs have satisfied all the above tests for waiver, and have provided additional reasons why the Social Security Act's exhaustion requirement should be waived. First, and most significantly, plaintiffs' claims in this case are not confined to direct claims for the payment of benefits. Instead, plaintiffs seek to affect the procedures by which the Secretary determines eligibility for benefits. Of course, plaintiffs' claims are generated from a belief that benefits would be awarded to them if SSA were to apply lawful standards to the review of their cases. Nevertheless, that fact does not convert their suit into a direct claim for benefits, in which the court would be asked to review the record of each

individual case to determine whether the Secretary's decision is supported by substantial evidence. In *Mathews v. Eldridge, supra,* the Supreme Court held that a plaintiff's due process claim to a pre-deprivation hearing was collateral to a substantive claim for benefits. 424 U.S. at 330. That the plaintiff in *Eldridge* hoped ultimately to have his benefits reinstated did not affect the court's decision concerning the essential nature of his claim.

78. *Smith v. Schweiker,* 709 F.2d 777 (2d Cir. 1983), relied on by the Secretary, does not affect this decision. In *Smith,* a panel of the Second Circuit Court of Appeals determined that a claim concerning the Secretary's application of a medical improvement standard, similar to a claim made in this case, was not collateral to the plaintiffs' substantive claims for benefits. In rejecting the plaintiffs' argument that exhaustion of the claim could be inferred, the court stated:

> "Exhaustion, moreover, would frame the issue in a much clearer fashion than is possible when it is posed as an abstraction. While the legal issue raised by plaintiffs may seem well-defined to them, it seems rather unformulated to us. What is meant by evidence of medical improvement, for example, is somewhat ambiguous."

709 F.2d at 780.

79. Unlike the abstract claims presented to the Second Circuit panel in *Smith,* the claims raised by plaintiffs in this case are all-too-sadly concrete. Plaintiffs here challenge the Secretary's refusal to follow three well-reasoned opinions by the Fourth Circuit Court of Appeals which this court is bound to follow. Where a legal standard has been clearly enunciated, this court is authorized, and indeed required, to determine whether the Secretary's posture with regard to that standard comports with the constitutional principles of separation of powers and due process. In addition, in this case, the court has received in evidence numerous documents from which this court as factfinder can decipher the

Secretary's questioned policies which are systematically applied to all claims for benefits.

80. The plaintiffs have further demonstrated that the harm they suffer cannot adequately be relieved by individual judicial review following complete administrative exhaustion of their claims. The Secretary has argued that whatever harm plaintiffs may suffer from a possible misapplication of the law to their cases will be compensated by the ultimate retroactive payment of benefits upon successful litigation in federal court. This claim overlooks several serious aspects of plaintiffs' situation.

81. First, as plaintiff Hyatt testified at the trial of this case, termination of disability benefits means for many of the members of plaintiffs' class the difference between existence at a bare subsistence level, and the ability to pay the utility bills to keep warm in freezing temperatures, or to purchase an occasional item of clothing or piece of meat. Even more seriously, the evidence reveals that many persons whose disability benefits are terminated lose the ability to pay for desperately needed medications and health care. Indeed, many former recipients (some of whose benefits were later reinstated on appeal) attested to the severe physical and mental stress occasioned by the termination itself. In some cases, this severe stress was closely followed by death. No amount of retroactive benefits can compensate for years of deprivation and anxiety — which may even ultimately result in death — resulting from the Secretary's wrongful practices. Another reason that retroactive benefits are not fully compensatory is that one-quarter of the amount ultimately awarded following district court litigation is often paid, pursuant to 42 U.S.C. §406(b)(1), to the lawyer who successfully represents the claimant in federal court.

82. Finally, the Secretary's argument overlooks the fact that the only claimants who will be retroactively compensated for the Secretary's application of an unlawful standard

of review are those "with the temerity to request. . . review." *Aldrich v. Schweiker*, 555 F. Supp. 1980, 1088 (D. Vt. 1982), *quoting, Spear v. Harris*, No. 80143, slip. op. at 7 (D. Vt. July 31, 1980). The possibility of the application of a double standard to members of a group of potential disability payment recipients who are similarly situated provides further necessity for an inference of waiver. *See Rivera v. Heckler*, 568 F.Supp. 235, 242 (D. N.J. 1983).

83. This case adequately questions and attacks the legality of the Secretary's rulings and guidelines for the determination of eligibility for benefits. To require each plaintiff to exhaust her administrative remedies would serve no useful purpose. *Weinberger v. Salfi, supra*, at 767.

84. Although the Secretary insists that her challenged rulings fit within the letter of the law, she has made no representation that they are subject to change at any time in the near future. The particular rulings in question, then, represent the Secretary's fixed position, to which the court has no doubt that the Secretary would adhere in reviewing each individual, substantive claim for benefits.

85. A requirement of exhaustion in this case would be the mere enforcement of formality, and a waste of administrative and judicial resources. *See, Kuehner v. Schweiker*, 717 F. 2d 813, 817-818 (3d Cir. 1983); *Graham v. Heckler*, 573 F.Supp. 1573, 1577-78 (N.D. W.Va. 1983). It would only add hardship to hardship.

II.
The Substantive Legal Merits Of The Case

86. The principle of separation of powers embodied in the United States Constitution is that federal courts retain the ultimate authority to interpret the law. *Marbury v. Madison*, 5 U.S. 137 (1803).

87. Decisions of the Fourth Circuit Court of Appeals interpreting the Social Security Act are binding upon the Social Security Administration when it decides claims of people who live within the territorial jurisdiction of this circuit. *See, PPG Industries, Inc. v. N.L.R.B.*, 671 F.2d 817, 823 n. 9 (4th Cir. 1982). (The NLRB, a federal adjudicative agency, was required to determine unfair labor practice cases arising within the circuit in accordance with the decisions of the Court of Appeals interpreting the National Labor Relations Act.)

88. In reaching its decision in *PPG Industries*, the Fourth Circuit expressed the position that has been adopted by the great majority of circuit courts addressing the question of an agency's refusal to follow the law of the circuit in which it functions. *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir. 1983); *Ithaca College v. NLRB*, 623 F.2d 224 (2d Cir. 1980); *Mary Thompson Hospital, Inc. v. NLRB*, 621 F.2d 858 (7th Cir. 1980); *Allegheny General Hospital v. NLRB*, 608 F.2d 965 (3d Cir. 1979); *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1252 (5th Cir. 1978). *But see, Yellow Taxi Company of Minneapolis V. NLRB*, No. 80-1481 (D.C. Cir. November 4, 1983) (NLRB not required to conform its rulings to every decision by court of appeals, but when law has been firmly established, Board is required to give court great deference). As the Court stated in *Allegheny Hospital, supra:*

> A decision by this court, not overruled by the United States Supreme Court, is a decision of the court of last resort in this federal judicial district. Thus our judgments. . . are binding on all inferior courts and litigants in the Third Judicial District, and also on administrative agencies when they deal with matters pertaining thereto. . . [T]he Board is not a court nor is it equal to this court in matters of statutory interpretation. Thus, a disagreement by the NLRB with a decision of this court is simply an academic exercise that possesses no authoritative effect. . . For the Board to predicate an order on its disagreement with this court's interpretation of a statute is for it to operate outside the law.

608 F.2d at 970, *quoted in Ithaca College v. NLRB*, *supra*, 623 F.2d at 228-29.

89. the law of this Circuit is that the Secretary may *not* require end-organ damage as an exclusive precondition to the establishment of a disability from hypertension or diabetes. *Martin v. Secretary of Dept. of Health, Ed. & Welf.*, 402 F.2d 905 (4th Cir. 1974). In *Martin*, the Fourth Circuit found that neither medical evidence nor the Social Security Act required a finding that a person is not disabled from hypertension or diabetes simply because he has not yet experienced end-organ damage.

90. The Secretary's regulations SSR 82-55 and POM 2107 directly contravene the law of the Fourth Circuit by mandating that disability claimants who suffer from hypertension or diabetes must conclusively be found not disabled unless they exhibit significant end-organ damage.

91. SSA operated outside the law of this circuit by evaluating the disability status of plaintiffs Herman Caudle and Mary Lovingood according to regulations which dictate that claimants who suffer from diabetes or hypertension, but who have not yet experienced any end-organ damage, are conclusively deemed not disabled from either of those two conditions.

92. The law of this Circuit requires the Secretary to evaluate the disabling effects of a disability claimant's pain even though the intensity of the pain is shown *only by subjective evidence*. *Myers v. Califano*, 611 F.2d 980 (4th Cir. 1980). In *Myers*, the Fourth Circuit reversed a denial of disability benefits which had rested on an SSA regulation requiring that impairments "must be demonstrable by medically acceptable clinical and laboratory diagnostic techniques." *Id.* at 983.

93. The Secretary's regulations SSR 82-58 and POM 2205 directly contravene the law of the Fourth Circuit by mandating that symptoms will not have a significant effect on a disability determination unless they are supported by objective clinical findings.

94. The fact that the Secretary's regulations may have changed since the time of the *Myers* decision makes no difference for purposes of this analysis; the current regulations are as repugnant to the law as the regulation evaluated in *Myers*. In *Myers*, the court found that the claimant had established a sufficient case of disability in that the intensity of her pain, which was substantiated only by subjective evidence, "had a specific physical cause." *Id.* The Secretary's regulation expressly contradicts the holding of *Myers*, as it states: "It is not sufficient to merely [sic] establish a diagnosis or a source for the symptom."

95. SSA expressly refused to follow the law of this Circuit, in evaluating the disability status of plaintiffs Patrick Hyatt and Mary Lovingood, when it failed to consider the disabling effects of the pain experienced by these plaintiffs notwithstanding the fact that such pain was not supported by objective clinical findings.

96. In *Dotson v. Schweiker*, 719 F.2d 80 (4th Cir. 1983), *reh. denied*, ___ F.2d ___ (4th Cir. Jan. 11, 1984), the Fourth Circuit, following the Administrative Procedure Act and applying a "familiar principle" of the presumptive continuing validity of judicial and administrative decisions, held that a previous determination of disability gives rise to a presumption that a claimant is still disabled. In order to rebut this presumption and justify termination of benefits, the Secretary is required to come forward with evidence that a claimant's condition has improved since the last disability determination. The rule adopted by the Fourth Circuit in *Dotson* has been applied by every federal court which has

directly considered the standards applicable to the termination of disability benefits. *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982); *Kuzmin v. Schweiker*, 714 F.2d 1233 (3d Cir. 1983); *Simpson v. Schweiker*, 691 F.2d 966 (11th Cir. 1982); *Doe v. Heckler*, _____ F. Supp. _____, No. M-83-2218 (D. Md. Dec. 13, 1983); *Graham v. Heckler*, 573 F. Supp. 1573 (N.D.W.Va. 1983); *Trujillo v. Schweiker*, 558 F. Supp. 1058 (D. Colo. 1983).

97. Since *Dotson* did not invent, nor claim to invent, any new rule of law, defendant's claim that it should not apply to pre-*Dotson* claims has no merit.

98. As she admits, the Secretary continues to determine, without any showing that the recipients' conditions have improved, that persons receiving benefits are no longer disabled. Thus the Secretary has explicitly chosen to disregard the law of the Fourth Circuit with respect to terminations of benefits.

99. Following her own regulations, and in direct contravention of the law of this Circuit, the Secretary terminated the disability benefits of plaintiffs Patrick Hyatt, Herman Caudle, and Mary Lovingood without any evidence that the condition of these plaintiffs had improved.

100. The Secretary contends that the Fourth Circuit's decision in *Dotson* is not binding law until the time for appeal has run on that case. No authority is cited to support this proposition. *This court* is bound by decisions of the Fourth Circuit Court of Appeals from the day they are issued; hence, in this case, the court is bound to apply the law as it stands in this circuit. As the Second Circuit stated in a similar case:

> "When [the NLRB] disagrees in a particular case, it should seek review in the Supreme Court. During the interim before it has sought review or while review is still pending, it would be reasonable for the Board to stay its proceedings in another case that arguably falls

> within the precedent of the first one. However, the Board cannot, as it did here, choose to ignore the decision as if it had no force or effect. Absent reversal, that decision is the law which the Board must follow."

Ithaca College v. NLRB, supra, at 228.

101. The Secretary has shown the court that she is abiding by the *Dotson* decision with respect to Dotson, the individual plaintiff in that case (who is now deceased); that she has not decided whether to appeal that case; and that she is currently appealing another case in the Fourth Circuit which raises the identical issues decided by the court in *Dotson.* These actions, the Secretary contends, show "awareness and respect" for the Fourth Circuit's opinion in *Dotson.* Sec'y's Supplemental Memo of Points and Authorities in Oppos. to Plaintiffs' Motions for Prelim. Inj. and Class Cert., 12.

102. The Secretary's position concerning the *Dotson* decision can hardly be characterized as "respectful." Respect for the law means *obeying* the law. In taking the position that the *Dotson* decision need not be followed by her, the Secretary has *dis*obeyed the law of this Circuit.

103. This court can understand why the Secretary might choose to appeal this issue in a case other than Dotson's; Dotson died, shortly after the Fourth Circuit's decision was rendered, from the very condition which the Secretary contended was not disabling. However, the Secretary may not continue an unlawful practice while she pursues, in an unrelated case, the issues conclusively determined by *Dotson.* Such a position, if accepted by a court, would allow the Secretary forever to escape the mandates of the law by abandoning appeals *before* a case reaches the Supreme Court for decision, but continuing to assert that she is litigating the issue by defending claims that have only freshly entered the federal court system.

104. A cabinet member is not above the law of the land, but is obligated to follow it. The Secretary is free to argue her

position in any case she chooses, but, absent express authority from Congress or the federal courts, she can not offer an appeal in a newly-filed and unrelated case as an excuse to evade the law in *this* case.

105. The Secretary finally contends that her right to disregard decisions of the Fourth Circuit Court of Appeals has recently been confirmed by the Supreme Court in its opinion in *United States v. Mendoza*, 52 U.S.L.W. 4019 (January 10, 1984). In *Mendoza*, a unanimous Supreme Court held that the government cannot be collaterally estopped from *relitigating* a constitutional issue adjudicated against it at the district court level in a different lawsuit brought by a different party.

106. In *Mendoza*, a United States district court in California *refused to hear the merits* of a defense raised by the government to a due process claim arising out of the Nationality Act of 1940. The court's reason for refusing to hear the merits of the government's defense was a prior decision unfavorable to the government rendered in a similar case by a different California United States district court. The Supreme Court held that nonmutual collateral estoppel may not lie against the government in such a case.

107. *Mendoza* is not in point. The pertinent holding of *Mendoza* was only that the government must be allowed to challenge a law in court on its merits, *not* that an officer of the government may disobey court decisions with which he or she disagrees. This court has not refused to hear the merits of anything defendant wanted to present; on the contrary it has proceeded to the merits without unnecessary delay, and has heard everything defendants had to offer. The plaintiffs have claimed that the Secretary does not follow the law of the Fourth Circuit, and have cited authority, squarely in point, to support this claim. The Secretary has asserted that she *does* follow the law of the Circuit or, that where she does

not follow it, she is not required to. The Court has considered the Secretary's case, has searched for its merits, and finds none.

108. Plaintiffs say (brief in support of injunctive relief, pp. 8-10) that their rights to "procedural due process" have been denied. Defendant responded in a footnote. Procedural due process does appear to be a valid additional basis of decision. *See Mathews v. Eldridge*, 424 U.S. 319, 322 (1976) (interest in continued receipt of disability benefits is a property interest protected by the Fifth Amendment); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (conclusion of agency as to eligibility for welfare benefits must rest upon legal rules and evidence presented at a hearing). I have always been puzzled as to how much one clarifies the concept of due *process* of law ("that process which is due") by calling that *process* "procedural." Moreover, the quest for procedural due process in this context leads inevitably for its identification back to the cases of *Myers*, *Martin* and *Dotson*. Therefore, although "procedural due process" is an additional valid basis for this decision, I will not add more to what has already been written.

DECISION

Plaintiffs have established a clear entitlement to have their claims for disability benefits reviewed pursuant to procedures that comport with the controlling decisions of this circuit interpreting the Social Security Act. The court will order relief consistent with this decision.

This 14 day of February, 1984.

/s/ JAMES B. MCMILLAN

JAMES B. MCMILLAN
United States District Judge

APPENDIX E

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

C-C-83-655-M

Patrick H. Hyatt; Herman O. Caudle and Mary P. Lovingood, on behalf of themselves and all others similarly situated,

Plaintiffs,

and

North Carolina Department of Human Resources, Disability Determination Services,

Plaintiff-Intervenor,

-vs-

Margaret M. Heckler, or her successors in office, Secretary of the United States Department of Health and Human Services,

Defendant.

JUDGMENT

Pursuant to the findings of fact and conclusions of law previously entered, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Defendant's motion to dismiss the action for lack of jurisdiction is DENIED.

2. Plaintiffs' motion for certification of a class is ALLOWED. The procedure for defining and notifying the

class and instituting class action proceedings is being set out in a separate order.

IT IS HEREBY FURTHER ORDERED that the Secretary of Health and Human Services is restrained and enjoined:

1. To cease immediately her policy of refusing to follow the law of the Fourth Circuit in implementing the Social Security Act in North Carolina.

2. To begin immediately to follow the law of the Fourth Circuit within North Carolina as it is expressed in *Martin v. Secretary of Health, Education and Welfare*, 492 F. 2d 980 (4th Cir. 1974), *Myers v. Califano*, 611 F. 2d 905 (4th Cir. 1980), and *Dotson v. Schweiker*, 719 F. 2d 80 (4th Cir. 1983), and to issue written directives to SSA and DDS officials and other persons responsible for the administration of Social Security disability programs in North Carolina, ordering such persons to follow Fourth Circuit standards.

3. Within thirty (30) days from the date of entry of this judgment, to provide the North Carolina Department of Human Resources, Disability Determination Services, with sufficient information with regard to disability claims to enable DDS to identify the persons who may be entitled to relief under this judgment.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED:

1. The case of plaintiff Hyatt is remanded for reconsideration by the Secretary in light of the findings of fact and conclusions of law previously entered.

2. A class action order will be entered.

3. Defendant shall provide plaintiffs access to the claims files sufficient to enable them to verify compliance with this judgment.

4. The Secretary shall pay to the North Carolina Department of Human Resources, Disability Determination Services, any costs incurred by DDS in implementing the terms of this judgment.

5. Defendant shall pay to plaintiffs' counsel their costs and reasonable attorneys' fees and expenses incurred in this case.

This 14 day of February, 1984.

/s/ JAMES B. MCMILLAN

James B. McMillan
United States District Judge

APPENDIX F

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

C-C-83-655-M

PATRICK H. HYATT; HERMAN O. CAUDLE and MARY P. LOVINGOOD, on behalf of themselves and all others similarly situated,

Plaintiffs,

and

NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES,

Plaintiff-Intervenor,

-vs-

MARGARET M. HECKLER, or her successors in office, Secretary of the United States Department of Health and Human Services,

Defendant.

ORDER CERTIFYING A CLASS AND REQUIRING NOTICE

Pursuant to the findings of fact, conclusions of law and judgment previously entered, and after consideration of further argument and briefs, the class is defined as follows:

A. The *Martin* and *Myers* subclass —

(1) All North Carolina residents who, since September 10, 1981, have applied for disability benefits (SSI or SSDI benefits) under the Social Security Act and whose claims were denied, either in an initial determination or another level of the administrative appeal procedure, because:

(a) the Secretary or DDS relied upon an absence or lack of end-organ damage, current or past, as determining that the claimant's hypertension or diabetes mellitus was not a severe impairment; or

(b) the Secretary or DDS relied upon an absence or lack of clinical findings as determining that the claimant's pain was not disabling; and

(2) All North Carolina residents whose benefits under the statute have, since September 10, 1981, been terminated or are subject to being terminated by the Secretary or DDS on grounds that they were not disabled under the Act for one or both of the reasons noted above in (a) and (b); and

B. The *Dotson* subclass —

All North Carolina residents whose Social Security disability benefits have, since October 6, 1982, been terminated or are subject to being terminated on grounds that the recipients were not disabled under the Act, without findings, and substantial evidence to support those findings, that, since the Secretary's most recent determination of disability as defined in the Act, there has been improvement in their medical condition sufficient that they are no longer disabled.

The court finds that the class meets the requirements for certification of a class action under Federal Rule of Civil Procedure 23(a) and 23(b)(2):

1. The class is so numerous (many thousands of claimants whose benefits have been terminated or whose applications have been denied) that joinder of all members is impracticable.

2. The claims of the members of the class as defined above present substantial common questions of law and fact. The claims have one significant and all-important feature of

commonality, in that it is the *procedures* under which the determinations are made (*i.e.*, in disregard of controlling court decisions) which all potential claimants are entitled to attack.

3. The claims of class representatives Hyatt, Caudle and Lovingood are typical of the claims of the class members.

4. The court finds that the named class representatives will fairly and adequately represent and protect the interests of the class.

5. The defendant has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

6. The exhaustion requirements of 42 U.S.C. §405(g) are met; the class includes only those persons who have presented or will have presented, in appropriate fashion, within the appropriate time limits, claims for benefits which come within the claims specified in the class designations.

7. The date of September 10, 1981 in paragraphs A.(1) and (2) is chosen because that is the date on which class representative Hyatt was notified that his disability had ceased, and on which he first became eligible to file a claim for reconsideration. Class members should be entitled to participate in this action as if they had filed claims on or since the date Hyatt became eligible to file a claim.

8. The date of October 6, 1982, is chosen for the beginning date of the group described in paragraph B. because that date is one year before the decision of the Fourth Circuit Court of Appeals in *Dotson v. Schweiker*, 719 F.2d 80 (4th Cir. 1983). *See* 20 C.F.R. §404.988 and §416.1488 (Secretary may reopen disability cases up to one year following final determination).

Defendant objects to the use of October 6, 1982, as the beginning date, arguing that the principle stated in *Dotson* is, even now, not the law in this Circuit. Instead, in a stated "spirit of cooperation with plaintiff's counsel," defendant proposes January 11, 1984, as the beginning date.

That proposal does not sound like cooperation.

As already stated by this court in its conclusions of law, numbers 97 and 100, the Secretary was already bound to apply the "medical improvement" standard before *Dotson* was decided.

Since *Dotson* did not invent, nor claim to invent, any new rule of law, defendant's claim that it should not apply to pre-*Dotson* claims has no merit.

Hyatt v. Heckler, C-C-83-655, slip op. at 37 (W.D.N.C. Feb. 14, 1984). *See also Dotson v. Schweiker*, 719 F.2d 80, 82 (4th Cir. 1983) (The *Dotson* court relied in part on section 4(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), an established rule of law that the proponent of a position has the burden of proof.) In addition, October 1982 is an appropriate beginning date because that is when the Secretary issued SSR 82-49c, her ruling of "non-acquiescence" with respect to *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982), which also applied a medical improvement standard.

9. The Secretary is further ORDERED to direct her agents at the North Carolina Disability Determination Services to mail, within sixty (60) days of the entry of this order, the Notice attached as Appendix A to the last known address of each North Carolina resident whose disability benefits were stopped on or after October 6, 1982. Along with the notice shall be mailed the postage-prepaid reply form attached as Appendix B and addressed to the North Carolina Disability Determination Services.

The Secretary has complained that sixty days are not enough time in which to mail notices to these class members,

arguing that her resources are limited because she "is currently attempting to comply with a number of injunctive orders in major class action lawsuits nationwide." Defendant further suggests that any deadline imposed by the court will adversely affect current beneficiaries or claimants who are not members of this class. Defendant's burdens are caused by her own apparent violations of the law. Sixty days should be ample time for her to comply.

10. The Secretary is further ORDERED to review the files of all North Carolina applicants for disability benefits since September 10, 1981, and all North Carolina residents whose benefits were stopped since September 10, 1981, exclusive of persons identified pursuant to paragraph 9, *supra*, to determine if their claims involved allegations of hypertension or diabetes or pain, or any condition with which pain is commonly associated, including, but not limited to, chronic back pain. To the last known address of each person so identified, the Secretary shall within one hundred and twenty (120) days of the entry of this order, send the Notice attached as Appendix C and the postage-prepaid reply form attached as Appendix D and addressed to the North Carolina Disability Determination Services.

11. Since all cases relevant to this action which are pending before administrative law judges or the Appeals Council have been processed under an erroneous view of the law which the Secretary has refused to change, potential class members who respond to either Notice will be given the option of having the North Carolina Disability Determination Services reassess their case at the initial level, or at whatever appellate level their case has reached. If the claimant has already had a hearing, an opportunity for a supplementary hearing shall be afforded. Counsel for all parties are directed to submit to the court within thirty (30) days of the entry of this order, proposed contents of the follow-up notices informing claimants of their options.

12. In addition to providing individual notice to potential class members, the Secretary is FURTHER ORDERED to publicize this decision by means of: Public service announcements on radio stations and television stations throughout North Carolina; posters in all Social Security offices, Offices of Hearings and Appeals, and Departments of Social Services; and press releases to newspapers throughout North Carolina.

13. SSA and DDS shall keep records of the names and pertinent information regarding the persons who respond to the notices required by paragraphs 10 and 12, *supra*. Each agency shall forward such information to the other agency. Lists of the names and pertinent information shall be supplied by each agency to plaintiffs' counsel, Legal Services, on the first of each month following the entry of this order.

14. Persons who respond to either of the individual notices or to the public notices, but who are then determined by Disability Determination Services or the Secretary not to be members of the class, shall be given an immediate opportunity to appeal that determination. If the number of appeals is large, or the determinations are not promptly made, the court will consider appointing a Special Master.

15. Copies of all directives which the Secretary has already sent to her agents concerning implementation of this order, or the court's February 14, 1984 order, shall be sent immediately to plaintiffs' counsel. Copies of future such directives shall be sent as and when they are issued.

16. All relief ordered in the judgment entered February 14, 1984 shall be afforded to the class members defined herein.

This 26 day of March 1984.

/s/ JAMES B. MCMILLAN

James B. McMillan
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

Civil Action No. C-C-83-655-M

PATRICK H. HYATT, HERMAN O. CAUDLE and MARY P. LOVINGOOD, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

and

NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES,

Plaintiff-Intervenor,

v.

MARGARET M. HECKLER, or her successors in office, Secretary of the United States Department of Health and Human Services,

Defendant-Appellant.

ORDER

This matter comes before the Court upon the order of remand issued by the United States Court of Appeals for the Fourth Circuit, *Hyatt v. Heckler*, 757 F.2d 1455 (1985), petitions for rehearing denied. The March 27 order of this Court, and the Fourth Circuit's instructions focus on the following class of plaintiffs:

A. The *Martin* and *Myers* subclass

(1) All North Carolina residents who, since September 10, 1981, have applied for disability benefits (SSI or SSDI benefits) under the Social Security Act and whose claims were denied, either in an initial determination or another level of the administrative appeal procedure, because:

(a) the Secretary or DDS relied upon an absence or lack of end-organ damage, current or past, as determining that the claimant's hypertension or diabetes mellitus was not a severe impairment; or

(b) the Secretary or DDS relied upon an absence or lack of clinical findings as determining that the claimant's pain was not disabling; and

(2) All North Carolina residents whose benefits under the statute have since September 10, 1981, been terminated or are subject to being terminated by the Secretary or DDS on grounds that they were not disabled under the Act for one or both of the reasons noted above in (a) and (b); and

B. The *Dotson* subclass

All North Carolina residents whose Social Security disability benefits have, since October 6, 1982, been terminated or are subject to being terminated on grounds that the recipients were not disabled under the Act, without findings, and substantial evidence to support those findings, that, since the Secretary's most recent determination of disability as defined in the Act, there has been improvement in their medical condition sufficient that they are no longer disabled.

In compliance with the Fourth Circuit's opinion and order,

IT IS HEREBY ORDERED:

1. *General.* The Court vacates the injunctive and declaratory relief it has heretofore ordered. The Secretary shall reconsider the claims of terminee class members (subclasses A(2) & B) pursuant to the Social Security Disability Reform Act of 1984. The claims of initial-applicant class members who have not met the requirements of Section 405(g) are dismissed. The Secretary shall reconsider the remaining claims of persons determined to be in subclasses A(1)(b) (the *Myers* initial applicants) pursuant to the interim pain standard of Section 3(a) of the 1984 Act. She shall reconsider the claims of persons determined to be in subclass (A)(1)(a) (the *Martin* initial applicants), reevaluating her policy of nonacquiescence in light of the 1984 Act's legislative history and circuit precedent. The complaint in intervention of the North Carolina Department of Human Resources, Disability Determination Services is dismissed. The Court will consider the matter of attorneys fees by way of separate order.

2. *Jurisdiction.* This Court will retain jurisdiction in this case solely for the purpose of assuring that individual class members are properly recognized for purposes of obtaining relief pursuant to this order. The Court will relinquish jurisdiction to monitor or review the Secretary's actions in administering new hearings or decisions that occur during the reconsideration of individual claims following remand. Relinquishing such jurisdiction is done without prejudice to class members' rights to seek timely review of the final decisions of the Secretary on remand in their respective judicial districts in separate actions pursuant to §405(g).

3. *Review of Class Identification Procedures.* Within the next 15 days, the Secretary shall: (1) turn over to plaintiffs' counsel a list of the names and addresses of all potential *Dotson* subclass members heretofore notified of possible class eligibility; and (2) permit plaintiffs' counsel to examine in Charlotte relevant documents concerning the Secretary's

computer programs, checklists and other aspects of her effort to identify *Dotson* subclass members. Similarly, within thirty days, the Secretary shall develop her plan for identifying *Martin* and *Myers* subclass members and make available in Charlotte to plaintiffs' counsel all relevant information about that plan (including the list of persons deemed entitled to receive the initial notice), as well as relevant documents. If, after reviewing any portion of the documents made available by the Secretary, plaintiffs' counsel deem it necessary to discuss the Secretary's procedures with persons knowledgeable about them, the Secretary shall promptly make such persons available in Charlotte for discussions with plaintiffs' counsel. If, after reviewing these identification programs, plaintiffs' counsel have any substantial dispute with the Secretary about the procedures she has used or proposes to use, they shall inform the Court, and the Court will resolve such dispute.

4. *Review of Individual Class Members' Cases.* The Court hereby remands to the Secretary and relinquishes jurisdiction over the claims of all individuals whom the Secretary already has determined to be in the class. As to other persons who have indicated interest, or in the future indicate interest, in participating in class relief, the Secretary shall within 30 days of receiving such indication (absent extraordinary circumstances) decide whether the person is a class member. If the Secretary finds that the person is a class member, his or her case thereupon shall be automatically and immediately remanded for a new hearing, and this Court will relinquish jurisdiction over it. If the Secretary decides that the person is not a class member, then (1) within 20 days thereafter, the Secretary shall so notify plaintiffs' counsel and make available the person's file to plaintiffs' counsel in Charlotte; (2) the Secretary and plaintiffs' counsel shall confer if plaintiffs' counsel disagrees with the Secretary's decision; and (3) the parties will submit the dispute to this Court for resolution if they cannot resolve it themselves.

5. *Resolution of Existing Questions Concerning Class Membership.* The following directives are made to clarify who is and who is not in the class entitled to relief under this Court's initial certification order as modified by the Court of Appeals:

(a) The group of terminee class members comprises all persons as to whom the Secretary has — from September 10, 1981 to present, at any level of review — made or upheld a decision that benefits should be terminated on the ground that the person is no longer disabled. Pursuant to the agreement of the parties no terminee shall be excluded on the ground that his or her case does not involve pain, hypertension or diabetes.

(b) The group of initial applicant class members comprises all persons who — from August 1, 1983 to present — were sent an Appeals Council decision affirming a denial of benefits. As set forth in the March 27 order, any such person is entitled to relief "if their claim involved allegations of hypertension or diabetes or pain, or any condition with which pain is commonly associated, including, but not limited to chronic back pain."

(c) Rejected applicants who were sent Appeals Council decisions before August 1, 1983, who seek class relief should get such relief if:

(i) They did not actually receive notice of the adverse Appeals Council decision until after August 5, 1983;

(ii) There was good cause, within the meaning of 20 CFR §404.911, for the failure to file a timely lawsuit, *e.g.*, 20 CFR §404.982; or

(iii) The Secretary has explicitly or implicitly granted a waiver or extension of the sixty day period of §405(g).

The Secretary, however, need not take this group of persons into account in formulating her computer program designed to generate the overinclusive pool of class members to whom initial notices are sent.

(d) No terminee shall be excluded from class relief because he or she brought an individual action and lost. Any initial applicant who brought an individual action and lost shall not receive relief, provided that the case has been finally disposed of (including by the running of all appeal periods) as of the date of this order. Class members who now have individual cases that have not been finally disposed of shall have the right to choose between obtaining a new review as a class member or proceeding with their own individual action. The Secretary shall promptly review all individual Social Security cases pending in North Carolina, and in each such case shall file and serve either Attachment A1 or Attachment A2, as appropriate.

(e) No person should be excluded from relief solely because the file shows that he or she has performed some work unless the record conclusively shows that the person has actually engaged in substantial gainful activity within the meaning of 20 C.F.R. §§404.1571-1576. If there is any possibility that a decisionmaker considered medical condition as well as work activity in making the adverse determination, and the person otherwise qualifies for class membership, the person is in the class.

(f) The class includes every person who otherwise meets the class requirements and now lives in North Carolina or has lived in North Carolina *at any time* after the class inception date (*i.e.*, September 10, 1981, for both terminees and initial applicants). In formulating procedures for identifying the pool of persons entitled to an initial notice, the Secretary need not review individual files to determine every past residence of each person who

might be in the class. The Secretary, however, shall fully utilize centralized sources of information that might identify persons who have resided in this state during the time period identified above.

6. *Notice.* The Secretary shall send Attachment B as the initial notice to terminees. She shall send Attachment C as the initial notice to applicants. When the Secretary informs persons they have not been accepted for class membership, she shall send them Attachment D (for terminees) or E (for initial applicants) setting forth their right to review of the decision in this Court. The Court reaffirms its March 27 order that: "In addition to providing individual notice to potential class members, the Secretary is further ordered to publicize this decision by means of: public service announcements on radio stations and television stations throughout North Carolina; posters in all Social Security offices and offices of Hearings and Appeals, and Departments of Social Services; and press releases to newspapers throughout North Carolina." If plaintiffs' counsel is able to set up a "hot-line," all notices sent out after its establishment shall be modified to prominently notify the recipient of such "hot-line."

7. *Program Monitoring Information.* The Secretary should provide to plaintiffs' counsel within 30 days the names of all persons who thus far have responded to her notices. From now on, each time the Secretary receives back a written response from a person she notifies, she should photocopy the person's name and address and send it to plaintiffs' counsel. The Secretary must also continue her stated present practice of sending a copy of every rejection letter to plaintiffs' counsel, and should also begin similarly sending copies of "acceptance" letters or periodic tabulations of the names and addresses of persons who have been reinstated. The Court will be tolerant of minor, unintentional failures to provide such notices, but the Court expects copies of all of

the notices described in this paragraph to be sent promptly to plaintiffs' counsel.

8. *Instructions on Remand.* Section 2(d)(4) of the 1984 Act provides that the Secretary's decisions regarding claims in subclasses A(2) and B are reviewable "in conformity with the time limits, exhaustion requirements and other provisions of Section 205 of the Social Security Act and regulations issued by the Secretary in conformity with such section." The Secretary is, therefore, directed to afford the members of these subclasses opportunity to seek the four levels of administrative review (initial determination, reconsideration, ALJ hearing, and Appeals Council review) set forth in 20 CFR, Part 404, Subpart J.

The Fourth Circuit's decision directs this Court to remand the claims of persons within Subclass A(1)(b) to the Secretary "for reconsideration pursuant to the interim pain standard of Section 3(a) of the 1984 Act" and to remand the claims of persons within subclass A(1)(a) to the Secretary for "reconsideration of her policy of non-acquiescence in light of the 1984 Act's legislative history and circuit precedent." With respect to claims of persons within subclass A(1)(a), the Fourth Circuit specified that a purpose of the remand is the development of "an unequivocal administrative record."

The 1984 Act does not mandate any particular form of remand with respect to these class members. The following specific instructions are fairly within the scope of the general instructions to this Court by the Court of Appeals, and indeed are necessary to achieve the aims of the Fourth Circuit in formulating those instructions:

(a) The Secretary must give these claimants an opportunity for a new hearing before an administrative law judge ("ALJ"), and an opportunity to present additional evidence in support of their claims; and,

(b) The Secretary must direct her decisionmakers that, if any of the claims present allegations or evidence that the claimant's hypertension or diabetes mellitus limits his or her ability to work, the decisionmakers must expressly consider these impairments in their decisions, expressly stating the standards under which their disabling effect are being evaluated.

9. The Court emphasizes that certain provisions in this Order reflect compromises of the parties reached in the unique setting of this case, and that this Order in no way reflects a precedent of this Court or a statement of policy by either party relevant in any other context.

This 25 day of June, 1985.

/s/ JAMES B. MCMILLAN

Honorable James B. McMillan

APPENDIX H

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

C-C-83-655-M

PATRICK H. HYATT; HERMAN O. CAUDLE and MARY P. LOVINGOOD, on behalf of themselves and all others similarly situated,

Plaintiffs,

and

NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES,

Plaintiff-Intervenor,

-vs-

MARGARET M. HECKLER, or her successors in office, Secretary of the United States Department of Health and Human Services,

Defendant.

AMENDED ORDER ALLOWING ATTORNEYS' FEES

Following is the April 6, 1984 order allowing attorneys' fees, as amended. Additions to the text are enclosed in brackets, and deletions from the text are marked through with dashes.

I

Plaintiffs brought this class action suit against defendant in the fall of 1983, seeking injunctive relief for defendant's wilful violation of the law. The North Carolina Department of Human Resources, Disability Determination Services, later intervened. On February 14, 1984, this Court ordered the defendant to stop acting in violation of specified "controlling decisions of the United States Court of Appeals for the Fourth Circuit of the United States."

Plaintiffs and intervenor have now moved for an attorneys' fee award under the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412.

II

[The EAJA, 28 U.S.C. §2412(b), confers discretion on a court to find the United States liable for "fees and expenses to the same extent that any other party would be liable under the common law . . . ."] The EAJA [further] provides that, unless otherwise provided by statute, a prevailing party in a case brought by or against the United States is entitled to fees, expenses and costs unless the United States establishes that its position in the litigation was "substantially justified or that special circumstances make an award unjust." 28 U.S.C. §2412(d)(1)(A).

[Intervenor is entitled to fees and expenses under 28 U.S.C. §2412(b). The United States has acted in bad faith, vexatiously and wantonly in this action (*see* discussion page 3, *infra*), and those actions justify an award of fees. *See, e.g., Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 258-259 (1975).]

Plaintiffs are clearly prevailing parties in this litigation. Just as clearly, the EAJA may apply to actions of the Secretary for Health and Human Services. *See Guthrie v. Schweiker*, 718 F.2d 104 (4th Cir. 1983). Therefore, the court must determine whether the government's position was "substantially justified." The burden is on the Secretary to show that her action met that standard. *See, e.g., Phillips v. Heckler*, 574 F. Supp. 870 (D.C.N.C. 1983); *Ulrich v. Schweiker*, 548 F. Supp. 63 (D. Idaho 1982). The "substantially justified" standard is essentially one of reasonableness, *Tyler v. Business Services, Inc. v. NLRB*, 695 F. 2d 73 (4th Cir. 1982), although "it can be concluded that the applicable standard which this court must apply is slightly above one based on reasonableness." *Wolverton v. Schweiker*, 533 F. Supp. 420, 424 (D. Idaho 1982). If the court finds that the

Secretary's position was not "substantially justified," then the court must determine whether "special circumstances" would make an award of fees unjust. Finally, the court must determine what amount of fees, if any, should be awarded.

III

The government's position in this case is neither "substantially justified" nor "reasonable." To the contrary, the Secretary's position is not even marginally justifiable, and it fairly may be characterized as outrageous, at best, both before this case was filed and during the course of this suit. The court found on February 14, 1984, as a matter of fact and of law, that the Secretary has consciously and wilfully disregarded the law. The court now reaffirms that conclusion. The government's defense in this court, on both jurisdictional and substantive grounds, of the Secretary's actions is equally unjustifiable. As this court held in its February 14, 1984 decision, the Secretary's jurisdictional defense is wholly without merit, and it has no substantive defense for its unlawful actions and practices. The court therefore concludes that the Secretary's position in this court is not substantially justified.

There are no "special circumstances" to make a fee award unjust.

[Plaintiffs, therefore, as well as intervenor, are entitled to fees and costs under the EAJA. Based on the bad faith shown by the United States in this case, plaintiffs are entitled to recover under either §2412(b) or §2412(d). Since plaintiffs' petition is based on §2412(d), however, the court will calculate fees on that basis.]

Counsel have submitted affidavits with their petitions for fees which cover the time, effort and costs incurred in pursuing the case before this court.

The court has analyzed the petitions in light of *Blum v. Stenson*, ____ U.S. ____, 52 U.S.L.W. 4377 (March 20,

1984), *Hensley v. Eckerhart*, ____ U.S. ____, 52 U.S.L.W. 4552 (May 16, 1983), and of the factors discussed in *Johnson v. Georgia Highway Express*, 488 F. 2d 714 (5th Cir. 1974), *Barber v. Kimbrell's, Inc.*, 577 F. 2d 216 (4th Cir. 1978), and *Anderson v. Morris*, 658 F. 2d 246 (4th Cir. 1981). Based on that analysis, the court will determine the fee to be awarded by making an initial estimate of a reasonable attorneys' fee, and then by making an adjustment in that estimate, if appropriate.

A. *Initial estimate of the various reasonable attorneys' fees.*

> "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate."

Blum v. Stenson, ____ U.S. at ____, 52 U.S.L.W. at 4377. The "reasonable hourly rate" is to be determined by considering an appropriate market rate for comparable legal services in the community. A court should consider a number of factors, including special skill and expertise and quality of representation when finding a reasonable hourly rate. *Id.* at 4380. This court will also consider the factors set forth in *Johnson v. Georgia Highway Express, supra*, which were cited with approval by the Fourth Circuit in *Barber v. Kimbrell's, Inc., supra*, and *Anderson v. Morris, supra*, in ascertaining the reasonable hourly rate applicable to the services rendered in this case. The burden is on the fee applicant to produce satisfactory evidence, including affidavits, that the requested rates are consistent with prevailing rates in the community for similar legal services. *Blum v. Stenson*, ____ U.S. at ____, 52 U.S.L.W. at 4379, fn. 11. Although the fee applicants in this case submitted motions, affidavits and supporting memoranda before the *Blum* decision was announced, and therefore based their applications on the procedure required by *Georgia Highway Express* and *Anderson v. Morris*, the information supplied is sufficient to inform and assist this court in the exercise of its discretion.

At the outset, the court [again] notes that the statutory basis for an attorneys' fee award in this case is 28 U.S.C. §2412, also known as the Equal Access to Justice Act (EAJA). [28 U.S.C. §2412(d)(2)(B), which applies to plaintiffs, states that:]

> [A]ttorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

The court takes judicial notice of *Impro Products, Inc. v. Block*, 569 F. Supp. 1389 (D.D.C. 1983) which considered the maximum rate allowable under the EAJA to be $83 per hour, based on an increase in the cost of living during 1981-82. The court in that case based its determination, at least in part, on *Price Index — All Urban Consumer*, U.S. Department of Labor, Bureau of Labor Statistics, Washington, D.C., April 22, 1983. Although personal experience makes this judge certain that the cost of living has risen further since publication of the *Price Index*, the court will not, without further evidence of that fact, increase the $83 per hour rate. Therefore, this court concludes that the maximum rate to be awarded [to plaintiffs] under the EAJA in this case, absent additional "special factors," is $83 per hour. [An award to intervenor is not restricted by the limitations stated in §2412(d)(2)(B). The court, however, in its discretion, will calculate intervenor's fee award based on the same considerations used to determine plaintiffs' fee award.]

Francis Pinckney, long an able attorney in this area and currently the president of the Mecklenburg County Bar Association, has submitted an affidavit which sets forth what he considers to be the prevailing fees in this legal community. Pinckney states that a reasonable fee range for an attorney with three or more years experience in federal litigation is $85 to $125 per hour. He further states that $60 per hour is a reasonable fee for a first-year associate with a year

of experience clerking for a United States Court of Appeals Judge. Finally, he states that $25 to $35 per hour is a reasonable fee range for summer law clerks and for paralegals specializing in litigation.

Six of the attorneys to whom fees are due (Bishop, Bryan, Fillette, Harper, Hayes and Wester) have more than three years of experience in federal litigation. Absent the limitations of the EAJA, therefore, each would be due a fee computed at more than $85 per hour.

A number of other factors support the application of an hourly rate at or near the higher end of the fee ranges articulated by Pinckney.

1. *The special skill and experience of counsel.* — Each of the six attorneys named above displayed great skill in this case. Although the length of experience of this group varies from four years to fourteen, those lawyers with the least amount of time practicing "the trade," attorneys Hayes and Harper, have developed substantial expertise in the field which was the subject matter of this lawsuit. Attorney Spence, although not as experienced as the other attorneys, also displayed commendable skill in his work in drafting documents presented to the court.

2. *The quality of representation.* — Counsel did an excellent job of representing the plaintiffs and the intervenor.

3. *The results obtained in this suit.* — Plaintiffs and the intervenor achieved substantially everything they sought in pursuing this litigation. The order of this court will affect favorably thousands of disabled people in a significant way. Furthermore, the prospective effect of this court's order will serve to prevent untold hardship from afflicting countless other disabled people.

4. *The novelty and difficulty of the questions raised, and the skill performed in rendering legal services.* — Although the legal questions were clear, the defendant was intransigent

throughout the course of the case. Counsel for plaintiffs and intervenor displayed great skill in presenting their positions and in refuting the contentions of defendant.

5. *Loss of other income on account of this case.* — A number of the attorneys and staff who worked on this case have never expected to be compensated. Those people, members of the law firm of Fleming, Robinson, Bradshaw & Hinson, P.A., offered their services to plaintiffs as part of the Volunteer Lawyers Program (VLP) of the Mecklenburg County Bar and of Legal Services of Southern Piedmont, Inc. The Volunteer Lawyers Program, from its inception, has had a policy that participating *pro bono* attorneys should seek the award of fees where appropriate in VLP cases, but that any fees awarded by a court should accrue directly to the VLP for utilization by the Program for further provision of free legal services to eligible residents of Mecklenburg County. The court concludes, therefore, that this factor should have no effect on the award.

6. *Time limitations imposed by the client or the circumstances.* — The circumstances of this case put a premium on fast action by counsel in seeking a court order stopping the defendant from failing to follow the law. The amount of benefits awarded or not awarded to each individual plaintiff may be small in the abstract, but the effects of withholding those payments from the plaintiffs are immediate and substantial. To the extent that this court's order prevents any future denial or cessation of deserved benefits, quick action by counsel afforded the plaintiffs greater relief than plaintiffs might otherwise have obtained.

7. *Reputation and ability of counsel.* — These characteristics of counsel were, and continue to be, excellent.

8. *The undesirability of the case within the legal community.* — This factor should have no effect on the award.

9. *Nature and length of the professional relationship.* — This factor does not affect the award.

All of the above factors would support a determination that the applicable hourly rate for attorneys Bryan and Wester should be at or near $125 per hour. The EAJA limits the rate, *prima facie*, however, to $83 per hour.

Attorney Spence's hourly rate is hereby determined to be $60 per hour. The rate for Bryan and Wester is hereby determined to be $83 per hour.

Attorneys Bishop, Fillette, Harper and Hayes, like Bryan and Wester, nothing else appearing, would also be entitled to charge $125 per hour. In addition, they are particularly experienced in litigation under the Social Security Act, and lawyers with their level of such expertise are not readily available. This "special factor," which is recognized in 28 U.S.C. §2412(d)(2)(A), justifies a higher hourly rate than otherwise allowed under the EAJA. *See Hoopa Valley Tribe v. Watt*, 569 F. Supp. 943 (N.D. Cal. 1983). The court therefore determines that Fillette and Hayes should be compensated at a rate of $95 per hour, and that Bishop and Harper should be compensated at the rate of $90 per hour.

The services of paralegal Vorhoff and law students Foster, Cassada, and Loeb should be compensated at the rate of $25 per hour.

10. *The time and labor expended.* — The affidavits submitted demonstrate that the following hours were spent on this case:

Attorneys	Hours
Bishop	117.40
Bryan	221.80
Fillette	25.00
Harper	258.00
Hayes	64.25
Spence	310.00
Wester	148.90
Law Students	
Cassada	107.30
Foster	63.50
Loeb	128.70
Paralegal	
Vorhoff	45.30

Based on all of the above factors, the court's initial estimate of a reasonable attorneys' fee for plaintiffs, which includes an award for law clerks and paralegal, is $89,728.85. The court's initial estimate of a reasonable attorney's fee for intervenor is $10,566.00.

B. *The suitability of an upward adjustment in the fee award.*

This case is a prime example of a situation in which a substantially enhanced award is justified. Although the "results obtained" in a suit

> *normally* should not provide an independent basis for increasing the fee award
>
> * * *
>
> in some cases of exceptional success an enhancement award may be justified.

Blum at 4381 (emphasis added). *See also Hensley v. Eckerhart*, __ U.S. __, 51 U.S.L.W. 4552 (May 16, 1983).

The contingent nature of the fee award also justifies an upward adjustment of the fee award, at least as to the plaintiffs' attorneys. *Cf. Blum v. Stenson*, 52 U.S.L.W. at 4381. *See also* 52 U.S.L.W. at 4381 (Brennan and Marshall, JJ., concurring). The plaintiffs' attorneys served their clients without hope of any payment unless they prevailed in the lawsuit. The unusual circumstances of this case make the contingent fee arrangement especially significant.

Despite the fact that this case is one in which an enhanced award is particularly appropriate, the limitations of the EAJA prevent such an upward adjustment of the fee. None of the parties have submitted any authority in support of the assertion that a court may enhance the award to the extent that the hourly rate limitations would be exceeded.

Taking all of the above factors into consideration, the court is of the opinion that a fee of $89,728.85 for plaintiffs' counsel, and a fee of $10,566.00 for intervenor's counsel, are reasonable, and should be paid.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the reasonable value of the services rendered by plaintiffs' counsel which are properly taxable under the Equal Access to Justice Act is $89,728.85.

2. That the sum of $89,728.85 shall be paid to Legal Services of Southern Piedmont, Inc. by the United States as counsel's full and only fee for representing plaintiffs in this civil action to this date.

3. That defendant shall also pay to Legal Services of Southern Piedmont, Inc. the plaintiffs' expenses and costs of $2,056.26.

4. That the reasonable value of the services rendered by intervenor's counsel which are properly taxable under the Equal Access to Justice Act is $10,566.00.

5. That the sum of $10,566.00 shall be paid to Attorney Jeffrey Bishop as his full and only fee for representing intervenor in this civil action to this date.

6. That defendant shall also pay to intervenor's attorney the intervenor's expenses and costs of $315.49.

This 8 day of May, 1984.

/s/ JAMES B. MCMILLAN

JAMES B. MCMILLAN
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
W.D. NORTH CAROLINA,
CHARLOTTE DIVISION.

No. C-C-85-655-M.

PATRICK H. HYATT; HERMAN O. CAUDLE AND MARY P. LOVINGOOD, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

AND

NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES, PLAINTIFFS-INTERVENORS

v.

MARGARET M. HECKLER, OR HER SUCCESSOR IN OFFICE, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT.

Sept. 11, 1985.

ORDER

McMILLAN, District Judges.

This case is before the court on plaintiffs' second and third motions for attorney fees.

The background to this case is set out in this court's orders reported at 579 F.Supp. 985 (W.D.N.C.1984) and 586 F.Supp. 1154 (W.D.N.C., 1984), *vacated* and *remanded*, 757 F.2d 1455 (4th Cir. 1985), and the order of remand filed June 25, 1985, and will not be repeated in detail here.

In its decision reported at 586 F.Supp. 1154, the court set in detail the *Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) and *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir. 1974) factors and their applicability to a fee award in this case. There is no need to repeat that litany once again. The issue presented to the court at this time is whether plaintiffs' fee award should be reduced to account for the issues on which the Appeals Court reversed this court's judgment and on which defendant might therefore be said to have prevailed.

Before addressing the specific issue of reduction of the award, the court will address the proposition advanced by defendant that plaintiffs are no longer prevailing parties as a result of the Fourth Circuit's decision. She argues that because the injunction against non-acquiescence was vacated, and because that was "all plaintiffs were asking for in bringing this suit," the plaintiffs are no longer prevailing parties and should be awarded no attorney fees. The court does not accept that contention. It defies the imagination to concoct an interpretation of this suit that would make plaintiffs anything but prevailing parties. Indeed, as discussed below, the court finds that, despite certain modifications of the original judgment, plaintiffs' achievements remain so substantial as to justify the court in finding that they have obtained excellent results and to award all but a small portion of the fees requested.

In vacating this court's injunction against the defendant's policy of non-acquiescence, the Fourth Circuit specifically stated that "the Secretary should not deem vacation of the injunction as approval of the policy [of nonacquiescence]" and that "we will not assume that the Secretary will disregard the views expressed in the Conference Report [to the 1984 Social Security Disability Reform Act] about the Secretary's policy of nonacquiescence in circuit law." (*Hyatt v. Heckler, supra,* 757 F.2d at 1460, 1461). The defendant appears to have taken

the admonitions of the courts and Congress to heart. On June 3, 1985, defendant issued a news release announcing that the Social Security Administration was abandoning, in the overwhelming majority of cases, its "practice of routinely not applying a circuit court's interpretation beyond the decision in the particular case." In its Interim Circular No. 185, apparently issued simultaneously for inclusion in the Office of Hearings and Appeals Handbook, defendant states

> SSA has been subject to increasing litigation in recent years involving a myriad of program issues. One of the most troubling questions which has been raised by Congress, the Courts, and by the public at large has been the issue of nonacquiescence. Recently, nonacquiescense has been the subject of various law suits challenging its legality. Moreover, Congress, in enacting the 1984 Disability Amendments, indicated in a Conference Report on that legislation that the Secretary should seek a resolution of the issue. These developments have led to a reexamination of the agency's practices. As a result, the Secretary has decided to modify the long-standing policy and has established a procedure described below. These procedures require that particular circuit court decisions will be considered prior to a final decision of the Secretary being rendered on the case.

The nexus between this suit and the modification of the Secretary's admittedly "long-standing policy" of nonacquiescence is thus admitted by the Secretary herself.

More fundamentally, plaintiffs have achieved the result for which the suit was originally filed and pursued. In order to be a prevailing party, "what always must occur is the establishment of a right or the proscription of a wrong." *Smith v. University of North Carolina,* 632 F.2d 316, 347 (4th Cir.1980). Plaintiffs have been granted the *right* to new hearings under lawful standards. This relief

would not have been achieved for most of the plaintiffs benefited by the order on remand filed June 25, 1985, had the suit not been filed and prosecuted to this point. Although the intervening legislation made the remands of the *Dotson* class "automatic," the members of the class who were not already in federal court benefited only because a class action had been filed in their behalf. The *Myers* and *Martin* class members would not have been guaranteed new hearings at all. The scope of the reconsideration of the claims of the latter two classes' members is beyond that which would have been required by an individual remand in those cases already filed in federal court. Plaintiffs' filing of the *Hyatt* suit, the motions for class certification and injunctive and declaratory relief, were all necessary to bring to the plaintiffs' classes the relief obtained by the issuance of the June 25, 1985, order of remand.

Defendants' exclusive focus on the vacation of the injunction against nonacquiescence is misplaced. That approach attempts to trivialize what has been a more than significant effort on behalf of and victory for the *rights* of the plaintiffs.

Defendant further argues that plaintiffs are not prevailing parties because the classes gaining benefits from this suit have shrunk drastically because of the reversal by the Fourth Circuit of the inclusion in the *Martin* and *Myers* classes of persons who did not exhaust administrative remedies or received adverse decisions from the Appeals Council more than 60 days prior to the filing of this suit but did not file suit pursuant to the requirements of 42 U.S.C. § 405(g). The Secretary brings forward figures (not previously presented to the court) that the original *Hyatt* classes, in total, may have included over 60,000 persons entitled to receive review of their claims but that the class has now shrunk to "only" between 10,000 and 15,000 people.

Although this reduction might entitle defendant to some reduction in the amount of fees awarded should it be found that a substantial portion of counsel's time was spent solely on those individuals' claims, this development does not change plaintiffs' status as prevailing parties. The fact remains that at least 10,000 persons and probably more, in North Carolina now have the opportunity for reconsideration of their disability claims where they had no such opportunity before this suit was filed and won. Even those persons benefited by the Social Security Disability Reform Act of 1984 (the *Dotson* class in particular), except those persons whose cases were already pending in federal court, would not have had the benefit of review had the class not been certified in *Hyatt* prior to September 19, 1984. The *Myers* and *Martin* class members who remain in the suit had no provision made for re-review of their claims under the new act.

Furthermore, as will be set out more fully below, the Supreme Court has specifically stated that the number of persons benefited in a particular lawsuit is not a "consideration of significance in calculating fees," *Blum v. Stenson*, 465 U.S. 886, ____, n. 16, 104 S.Ct. 1541, 1549, n. 16, 79 L.Ed.2d 891, since, "presumably, counsel will spend as much time and will be as diligent in litigating a case that benefits a small class of people, or, indeed, in protecting the civil rights of a single individual." *Id.*

In conclusion, the court finds that plaintiffs remain the prevailing parties in this case and that the government's position has not been substantially justified for the reasons set out in the orders previously filed and the matters discussed herein. Therefore, plaintiffs are entitled to an award of attorney fees.

The court has already set out in its earlier attorney fee order the factors to be considered in determining the amount of fees to which plaintiffs are entitled and their applicability to this case. With a few minor adjustments,

they remain applicable here. The central issue is whether, considering the Fourth Circuit's decision, the 1984 Disability Reform Act, and the final order entered in this case on June 25, 1985, a reduction in the award of fees is warranted.

Upon reviewing the pleadings, trial transcript and records of other hearings conducted in this case, the Fourth Circuit's decision and the final order of remand, the court finds that the plaintiffs achieved *exceptional results,* despite reductions in the size of the class because of the Fourth Circuit's ruling on the merits of the legal question of exhaustion and the applicability of the requirements of 42 U.S.C. § 405(g).

Defendant argues that the Supreme Court's decision in *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), requires substantial reduction, if not elimination, of the award requested. In *Hensley,* the Supreme Court held that where a plaintiff presents "in one lawsuit distinctly different claims for relief that are based on different facts and legal theories" and one or more of those "distinctly different claims for relief" is unsuccessful, "the congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." *Id.* at 435, 103 S.Ct. at 1940.

There are two claims which defendant contends were unsuccessful here—the request for an injunction against the Secretary's policy of nonacquiescence and the requests for relief for members of the *Martin* and *Myers* classes who did not follow the requirements of 42 U.S.C. § 405(g) and who were, therefore, removed from the class by the Fourth Circuit's ruling.

The court has discussed the first claim at length, above, and finds no basis to penalize plaintiffs for their work which, while not directly judicially enforced, did by

defendant's own public acknowledgment contribute to a change in her policy more widespread than ever possible in any one lawsuit. *See, Bonnes v. Long,* 599 F.2d 1316, 1319 (4th Cir.1979), *after remand,* 651 F.2d 214 (1981), *cert. denied,* 455 U.S. 961, 102 S.Ct. 1476, 71 L.Ed.2d 681; *Smith v. University of North Carolina, supra.*

As to the second claim, this lawsuit does benefit *directly* a reduced number of persons as a result of the rulings by the Fourth Circuit on the legal issues of exhaustion of administrative remedies and the applicability of Section 405(g). However, this element of the case can not be said to represent a separate "claim for relief" in the language of *Hensley. Hensley* is clear in that what is referred to are separate substantive claims for relief which are severable from the rest of the litigation. The Court in *Hensley* states:

> It may well be that cases involving such unrelated claims are unlikely to arise with great frequency. Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.
>
> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally, this will encompass all hours reasonably expended on the litigation and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not

> be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. . . . The result is what matters.

Id. 461 U.S. at 435, 103 S.Ct. at 1940.

A comparison between the issues involved in this case and the issues involved in *Hensley* illustrates the difference between separate, distinct claims for relief and interrelated claims based on a common core of facts or related legal theories. In *Hensley,* the plaintiffs were complaining about different, severable aspects of their conditions of confinement. In this case, the plaintiffs were complaining about the Secretary's treatment of their claims for disability benefits (in relation to circuit court precedent) in three separate areas. Plaintiffs achieved success in each of those three areas. Cases involving *Dotson, Myers* and *Martin* claims are all being remanded to the Secretary for reconsideration. The loss of the exhaustion issue represented only a reduction in the size of the *Martin* and *Myers* classes, not a disapproval of their substantive claims for relief. Indeed, those persons remaining in those classes have obtained new full-scale review of their claims at the administrative level with the later opportunity to appeal adverse decisions to the courts pursuant to the requirements of 42 U.S.C. § 405(g). Additionally, as noted above, the Supreme Court has cautioned that the *number* of persons benefited is not of considerable significance.

The court finds that plaintiffs have achieved excellent results, and as stated in its earlier order, would be entitled to enhancement of their fees but for the limitations imposed by the act under which fees are claimed. According to *Hensley,* based on the finding that excellent resutls have been obtained, plaintiffs are entitled to a full compensatory fee for all hours reasonably expended.

Defendant does not question that plaintiffs' counsel's hours were reasonably expended, although she does contest their rights to compensation for all of the hours.

Although *Hensley* would seem not to require *any* reduction, the court will order some reduction to account for the time spent litigating the exhaustion and § 405(g) issues. That issue did not represent a large portion of counsel's efforts in this court, but it appears that a not insignificant amount of time was spent by counsel defending this court's order in their favor on this point in the cirucit court. The court finds that, in fairness, some reduction in the amount of fees required to be paid by the government should be made. The court has reviewed the pleadings, and finds that a reduction of 5% in fees for the time spent researching and arguing the exhaustion and § 405(g) requirements issues is ample.

The court emphasizes that it finds this fee request very modest in light of the labor expended on behalf of the plaintiffs over a relatively brief time span and because of the magnitude of this suit and the opportunity for relief brought to thousands of our most needy and deserving citizens—the workers of our state who, because of difficulties beyond their control, have lost the ability to perform substantial gainful employment and who now ask to be allowed to draw on the contributions they and others have made to our Social Security system.

The court's fee awards of April and May, 1984, are brought forward in the amount of $89,728.85 in fees for plaintiffs' counsel (intervenor's counsel is no longer entitled to a fee award because of the dismissal by the Fourth Circuit of the intervenor's complaint) and expenses and costs in the amount of $2,056.26.

Since the last fee award through July 25, 1985, additional counsel have been substituted in this case and counsel have devoted many more hours to the case. Charles McBrayer Sasser, a 1981 University of North Carolina School of Law graduate and legal services attorney specializing in Social Security disability law, has devoted 303 hours to the case as lead counsel for legal services. His expenses total $857.70.

From the firm of Robinson, Bradshaw and Hinson, which has continued to devote many exceptional hours of attorney time to this case, John R. Wester, lead counsel, has devoted an additional 299.10 hours to the case. Dan Coenen, a 1978 law graduate of Cornell Law School where he was editor-in-chief of the law review, clerked for Judge Clement Haynsworth of the Fourth Circuit and Justice Blackmun of the Supreme Court before entering the practice of law in 1981. His work on this case has been of the highest quality as reflected in the briefs and arguments of counsel, and he has devoted 307.4 hours to the case.

Robert W. Bryan has devoted an additional 41.2 hours to the case, Herman Spence III has devoted an additional 162.85 hours to the case, and David C. Wright III has devoted 21.3 hours to the case. The expenses documented by the firm total $6,740.30 since the last fee and expenses award.

Campbell Lucas Vorhoff, and Brenda Dutton Mosier, paralegals employed by Robinson, Bradshaw and Hinson, have devoted an additional 66.60 hours and 15.7 hours, respectively, to the case.

David Williams, a Harvard law school student, has devoted 25.35 hours to the case.

The court has reviewed the records and finds that the hours billed are reasonable and that plaintiffs are entitled to full reimbursement (minus the 5% overall reduction) for the time spent through July 25, 1985, negotiating and implementing the order on remand filed June 25, 1985, to this date, and pursuing the attorney fees award. The court expresses no opinion at this time on the propriety of awarding further fees for work done in furtherance of the implementation of the order on remand from July 26, 1985, forward.

The court finds that the rates of reimbursement for attorneys Sasser, Wester, Bryan and Coenen would normally be at or near $125 per hour except for the limitation

in the Equal Access to Justice Act (EAJA) to a rate of $75 per hour plus an allowance for cost of living increases or where a "special factor" is present. The court finds that the special experience of the attorneys in this area (that of Wester and Coenen apparently gained through the litigation) is such a "special factor," justifying a higher hourly rate. In addition, the current cost of living adjustment (based on figures from the Consumer Price Index of the United States Department of Labor) to the EAJA fee allows award of a fee up to approximately $95 per hour. *See* this court's decision in *Black v. Heckler,* C-C-83-38 (order filed July 12, 1985). *See also Action on Health and Smoking v. C.A.B.,* 724 F.2d 211 (D.C.Cir. 1984). The rate for attorneys Sasser, Wester and Coenen is hereby determined to be $95 per hour.

The court finds that a reasonable rate for reimbursement of attorneys Spence and Wright is $75 per hour. The services of paralegals Vorhoff and Mosler and law student Williams should be compensated at the rate of $30 per hour, a fee comparable to that awarded by this court for the services of paralegals and law students in other comparable cases. *See, Pratt v. Carolina Machinery,* C-C-83-270-M (order awarding attorney fees filed March 19, 1985).

The following hours have been shown by affidavit to have been reasonably expended on this litigation from March 15, 1984, through July 25, 1985, and, multiplied by the rates found to be reasonable, above, produce the following calcalations of reasonable attorney fees:

Webster	299.10 hours × $95 per hour =	$ 28,414.50
Sasser	303.00 hours × $95 per hour =	28,785.00
Coenen	307.04 hours × $95 per hour =	29,168.80
Bryan	41.20 hours × $95 per hour =	3,914.00
Spence	162.85 hours × $75 per hour =	12,213.75
Wright	21.30 hours × $75 per hour =	1,597.50
	Total:	$104,093.55

Paralegal fees		
Vorhoff	66.60 hours × $30 per hour =	1,998.00
Mosier	15.70 hours × $30 per hour =	471.00
Williams	25.35 hours × $30 per hour =	760.50
	Total:	$ 3,229.50

The court brings forward the amounts awarded to plaintiffs for reasonable attorney fees awardable under the EAJA in May, 1984, in the amount of $89,728.85 in attorney fees and $2,056.26 in costs.

Plaintiffs are entitled to attorneys' fees of $187,199.30 ($197,051.90 less 5%) for their services rendered through July 25, 1985, plus reimbursement for $7,598.00 in expenses. An upward adjustment will not be made for the reasons set out in the order of May 1984, 586 F.Supp. 1154, 1159.

IT IS THEREFORE ORDERED:

1. That the reasonable value of the services rendered by plaintiffs' counsel which are properly taxable under the Equal Access to Justice Act is $187,199.30.

2. That the sum of $187,199.30 shall be paid to plaintiffs by the United States as counsel's full and only fee for representing plaintiffs in this civil action through July 25, 1985.

3. That defendant shall also pay to plaintiffs the plaintiffs' expenses and costs of $7,598.00.

APPENDIX J

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 205(g) of the Social Security Act, as codified at 42 U.S.C. 405(g), provides:

Judicial review

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation

prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

2. Section 223(d)(1)(A) and 2(A) of the Social Security Act, as codified at 42 U.S.C. 423(d)(1)(A) and (2)(A), provides:

(d) "Disability" defined

(1) The term "disability" means–

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in

death or which has lasted or can be expected to last for a continuous period of not less than 12 months; * * *

* * * * *

(2) For purposes of paragraph (1)(A)—

(A) an individual (except a widow, surviving divorced wife, or widower for purposes of section 402(e) or (f) of this title) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

3. Section 1614(a)(3)(A) and (B) of the Social Security Act, as codified at 42 U.S.C. 1382c(a)(3)(A) and (B), provides:

(3)(A) An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).

(B) For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work

but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

4. Section 223(d)(2)(C) of the Social Security Act, as codified at 42 U.S.C. (Supp. III) 423(d)(2)(C), provides:

(C) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

5. Section 1614(a)(3)(G) of the Social Security Act, as codified at 42 U.S.C. (Supp. III) 1382c(a)(3)(G), provides:

(G) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

6. Section 3 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1799, provides:

EVALUATION OF PAIN

(a)(1) Section 223(d)(5) of the Social Security Act is amended by inserting after the first sentence the following new sentences: "An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability. Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability.".

(2) Section 1614(a)(3)(H) of such Act (as added by section 8 of this Act) is amended by striking out "section 221(h)" and inserting in lieu thereof "sections 221(h) and 223(d)(5)".

(3) The amendments made by paragraphs (1) and (2) shall apply to determinations made prior to January 1, 1987.

(b)(1) The Secretary of Health and Human Services shall appoint a Commission on the Evaluation of Pain (hereafter in this section referred to as the "Commission") to conduct a study concerning the evaluation of pain in determining under titles II and XVI of the Social Security Act whether an individual is under a disability. Such study shall be conducted in consultation with the National Academy of Sciences.

(2) The Commission shall consist of at least twelve experts, including a significant representation from the field of medicine who are involved in the study of pain, and representation from the fields of law, administration of disability insurance programs, and other appropriate fields of expertise.

(3) The Commission shall be appointed by the Secretary of Health and Human Services (without regard to the requirements of the Federal Advisory Committee Act) within 60 days after the date of the enactment of this Act. The Secretary shall from time to time appoint one of the members to serve as Chairman. The Commission shall meet as often as the Secretary deems necessary.

(4) Members of the Commission shall be appointed without regard to the provisions of title 5, United States Code, governing appointments in the competitive service. Members who are not employees of the United States, while attending meetings of the Commission or otherwise serving on the business of the Commission, shall be paid at a rate equal to the per diem equivalent of the rate provided for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day, including traveltime, during which they are engaged in the actual performance of duties vested in the Commission. While engaged in the performance of such duties away from their homes or regular places of business they may be

allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

(5) The Commission may engage such technical assistance from individuals skilled in medical and other aspects of pain as may be necessary to carry out its functions. The Secretary shall make available to the Commission such secretarial, clerical, and other assistance and any pertinent data prepared by the Department of Health and Human Services as the Commission may require to carry out its functions.

(6) The Secretary shall submit the results of the study under paragraph (1), together with any recommendations, to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate not later than December 31, 1985. The Commission shall terminate at the time such results are submitted.

7. 20 C.F.R. 404.1520, 404.1521, 416.920 and 416.921 provide:

§ 404.1520 Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not have a severe impairment.

(d) *When your impairment(s) meets or equals a listed impairment in Appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing any other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only

did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 404.1562).

§ 404.1521 What we mean by an impairment(s) that is not severe.

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.

(b) *Basic work activities.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, coworkers and usual work situations; and

(6) Dealing with changes in a routine work setting.

§ 416.920 Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s),

your residual functional capacity and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your mental condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

(d) *When your impairment(s) meets or equals a listed impairment in Appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work, If you cannot, we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 416.962).

§ 416.921 What we mean by an impairment(s) that is not severe.

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.

(b) *Basic work activities.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, coworkers and usual work situations; and

(6) Dealing with changes in a routine work setting.

APPENDIX K

SOCIAL SECURITY RULING (SSR) 82-55
(PREVIOUSLY PUBLISHED AS PPS-84)

TITLES II AND XVI: MEDICAL IMPAIRMENTS THAT ARE NOT SEVERE

PURPOSE: To enunciate the policy regarding nonsevere impairments and to provide examples of impairments that are not severe in order to more clearly illustrate the level of severity required before the concept of "nonsevere impairment" can be applied in the sequential evaluation of disability.

CITATIONS (AUTHORITY): Sections 216(i), 223(d), and 1614(a)(3)(A) of the Social Security Act, as amended; Regulations No. 4, sections 404.1520 and 404.1521; and Regulations No. 16, sections 416.920 and 416.921.

PERTINENT HISTORY: Regulations No. 4, section 404.1502(a), published in 1960, introduced the principle that a denial determination may be made on the basis of medical considerations alone. It stated that:

> ". . . medical considerations alone may justify a finding that the individual is not under a disability where the only impairment is a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or combination of slight abnormalities."

Sections 404.1504 and 416.904 of the regulations published in 1978 revised the 1960 statement and included a statement on work-related functions as follows:

> ". . . medical considerations alone can justify a finding that an individual is not under a disability where the medically determinable impairment is not severe. A medically determinable impairment is not severe if it does not significantly limit an individual's physical or mental capacity to perform basic work-related functions."

The meaning of work-related functions was explained in 1980 by sections 404.1521 and 416.921 of the regulations which now provide:

(a) "Nonsevere impairment. An impairment is not severe if it does not significantly limit your physical or mental abilities to do basic work activities."

(b) "Basic work activities. When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs . . ."

Examples of basic work functions are included in sections 404.1521(b) and 416.921(b).

Throughout this period of regulatory revision, we have tried to identify medical conditions which demonstrate nonsevere impairments. Based on increasing experience and extensive consultation with disability program physicians, 20 examples of medical conditions that are not severe have now been recognized. These 20 examples are intended to illustrate a level of impairment severity where the evaluation principle for nonsevere impairments applies. In addition, these 20 examples, while not exhaustive, represent a significant number of specific impairments that serve as guidelines on the level of impairment severity which would warrant a finding that an individual's impairment is not severe.

POLICY STATEMENT: In determining whether an individual is disabled, we follow a sequential evaluation process whereby current work activity, severity and duration of impairment, residual functional capacity (RFC), and vocational factors (age, education and work experience) are considered in that order.

Built into this process is the statutory requirement that to be found disabled, an individual must have a severe medically determinable impairment. For an impairment to be

considered severe, it must significantly limit the individual's physical or mental capacity to perform one or more basic work-related functions such as standing, walking, lifting, handling, seeing, hearing, speaking, and understanding and following simple instructions. An impairment that does not significantly limit the capacity to perform work-related functions, as they are required in most jobs, is not severe.

At that stage in the sequential evaluation process, when we may decide that an impairment is not severe, we do not consider the effects of age, education, and work experience (i.e., the vocational factors) since in such cases the determination is based on medical considerations alone. Similarly, the individual's RFC is not assessed in cases in which the individual's impairment is determined to be not severe. In such cases, the RFC assessment is not relevant because it is based upon functional limitations which result from a severe impairment, and, thus, it only comes into play at a later stage in the sequential evaluation process.

If an individual had a highly selective job involving unusual work-related functions, a nonsevere impairment may prevent him or her from performing his or her previous work. However, when an individual has a "nonsevere" impairment, no serious question of inability to engage in substantial gainful activity is present because the individual would clearly be able to perform the basic work-related functions as they are required in most jobs. The inability to perform prior work in such an instance would arise from *both* the specific demands of the work and the impairment rather than the impairment itself.

If the individual's impairment is shown by the medical evidence to be not severe in accordance with the criteria and examples described herein, that impairment cannot itself prevent performance of work-related functions, except as they may be required in a highly selective group of

jobs. To be found disabled, an individual must have a severe medically determinable impairment. That standard cannot be satisfied by any impairment(s) that is compatible with the ability to perform basic work-related functions as required in most of the numerous jobs in the national economy.

Inasmuch as a nonsevere impairment is one which does not significantly limit basic work-related functions, neither will a combination of two or more such impairments significantly restrict the basic work-related functions needed to do most jobs. However, when a nonsevere impairment(s) is imposed upon a severe impairment(s), the combined effect of all impairments must be considered in assessing RFC.

The following examples are merely representative of the types of impairments which would be considered not severe and are not intended to be all inclusive. In formulating these examples, the potential for severe and prolonged pain has been considered. These conditions are not expected to produce symptoms of severe and prolonged pain.

1. Musculosketal
   a. Osteoarthritis corrobated by X-ray findings, with symptoms of pain and stiffness of lumbar or cervical spine or major joints, and minimal abnormal findings on physical examination.
   b. Traumatic fracture of a vertebral body, in the absence of metabolic bone disease, with loss of less than 50 percent of height of the vertebra without significant physical findings or neurologic abnormalities.
   c. Excision of lumbar disc has been performed and there are no ongoing significant motor abnormalities or significant objective abnormal physical findings.

2. Special Senses
   a. Retention of best corrected visual acuity of 20/40 in the better eye (phakic) without significant restriction of visual fields.
   b. Retention of visual field in better eye of a radius of 45 degrees or better (visual field efficiency or approximately 70 percent).
3. Respiratory
   a. Obstructive airway disease where FEV_1 or MVV is greater than values shown in the table below, and there is no clinical evidence of impairment of gas exchange.

Height* (Inches)	FEV_1 (L/Min., BTPS)	MVV (MBC) (L/Min., BTPS)
60 or less	1.4	56
61-63	1.5	60
64-65	1.6	64
66-67	1.7	78
68-69	1.8	72
70-71	1.9	76
72 or more	2.0	80

   * Height without shoes.

   b. Diffuse pulmonary fibrosis where the arterial blood gas values do not meet the requirements of Listing 3.04, table III, at an exercise level of 25 ml.0_2/kg/min., or work equivalent.
4. Cardiovascular
   a. Hypertension without significant organ damage, current or past.
   b. History of chest pain without specific ischemic findings on ECG (rest and exercise), less than 50 percent narrowing on angiography, and without significant cardiomegaly.
   c. Surgery has been performed for peripheral arterial disease and there are palpable pulses below the femoral level and no intermittent claudication.

5. Digestive
   a. Colostomy, uncomplicated, with proper function of the stoma and nutrition adequately maintained.
   b. Peptic ulcer, uncomplicated or with recovery from complications.
   c. Chronic liver disease, in the absence of ascites, with total bilirubin less than 1.5 mg. per decilter and serum albumin is 3.5 gm. per deciliter or greater.
   d. Inflammatory bowel disease (regional enteritis, ulcerative colitis) in clinical remission for 12 months prior to adjudication.
6. Genito-Urinary
   a. Nephrotic syndrome, in remission, with persistent mild edema in which urinary protein excretion is less than 500 mg. per 24 hours and serum albumin of 3.5 gm. per deciliter or greater.
   b. Chronic renal disease (other than nephrotic syndrome) in which the serum creatinine is persistently less than 3 mg. per deciliter (100 ml.), in the absence of clinical complications.
7. Endocrine
   a. Diabetes mellitus, adult onset, controlled on prescribed therapy, without significant end-organ damage or recent episodes of acidosis.
8. Neurological
   a. Epilepsy with no major motor seizures for 12 months prior to adjudication.
   b. Peripheral neuropathy or neuritis, due to any cause, with no significant motor or sensory loss.
9. Mental Disorders
   a. IQ of 80 or greater in all major areas of intellectual functioning.

EFFECTIVE DATE: The policy explained herein was effective on August 20, 1980, the date the regulations

covering the basic policy in the subject area were effective (45 FR 55566).

CROSS-REFERENCE: Program Operations Manual System, section 2107.

Supreme Court, U.S.
FILED
JUN 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1861

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

PATRICK M. HYATT, HERMAN O. CAUDLE and MARY P. LOVINGOOD, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JOHN R. WESTER
(Counsel of Record)
DAN T. COENEN
ROBINSON, BRADSHAW & HINSON, P.A.
1900 Independence Center
Charlotte, North Carolina 28246
(704) 377-2536

CHARLES MCBRAYER SASSER
LEGAL SERVICES OF SOUTHERN PIEDMONT, INC.
Suite 600-East Independence Plaza
700 East Stonewall Street
Charlotte, North Carolina 28202
(704) 376-1608

Attorneys for Respondents

QUESTIONS PRESENTED

This case, previously before this Court in No. 85-474, was the subject of this Court's remand order of June 9, 1986 to the Fourth Circuit in light of *Bowen v. City of New York*, 106 S. Ct. 2022 (1986). The questions presented are:

1. Whether the Fourth Circuit erred in following this Court's instructions to apply the jurisdictional guidelines articulated in *City of New York* to the particular facts of this case.

2. Whether the Fourth Circuit erred in upholding the District Court's award of attorneys' fees premised on findings from trial evidence that Petitioner had adopted and followed a purposeful policy to disregard Fourth Circuit decisions if in conflict with Petitioner's policy rulings.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
STATEMENT.....	1
A. The Procedural Background of this Case.....	1
B. The Decision in City of New York.....	8
C. The Fourth Circuit's Decision on Remand.....	12
D. The Polaski Case.....	17
DISCUSSION.....	18
CONCLUSION.....	48

TABLE OF AUTHORITIES

	Page
Allegheny General Hospital v. NLRB, 608 F.2d 965 (3rd Cir. 1979).....	26
Beverly-Enters. v. NLRB 727 F.2d 591 (6th Cir. 1984).....	26
Bowen v. City of New York, 106 S. Ct. 2022 (1986).....	8, 9, 10, 12, 14, 15, 17, 18, 24, 28, 29, 30, 31, 42, 43, 44
Bowen v. Yuckert, No. 85-1409 (U.S. June 8, 1987).....	35, 36
City of New York v. Heckler, 578 F. Supp. 1109 (1984), aff'd. 742 F.2d 729 (2d Cir. 1984), aff'd 106 S. Ct. 2022 (1986).....	9, 10
Dotson v. Schweiker, 719 F.2d 80 (4th Cir. 1984).....	4, 10
Elrod v. Suran, 465 U.S. 1108 (1984).....	40
Flores v. HEW, 228 F. Supp. 877 (D.P.R. 1964).....	26

Page

Foster v. Heckler,
780 F.2d 1125 (4th Cir.
1986)..... 38, 39

Heckler v. Lopez,
466 U.S. 955 (1984)..... 27

Heckler v. Lopez,
463 U.S. 1328, motion to
vacate stay denied,
464 U.S. 879 (1983), stay
granted in part and denied
in part, 466 U.S. 955
(1984)..... 27

Heckler v. Ringer,
104 S. Ct. 2013 (1984)..... 5, 6

Hollaway v. Valley,
464 U.S. 914 (1983)..... 40

Hunt v. Schweiker,
685 F.2d 121 (4th Cir.
1982)..... 6

Hyatt v. Heckler,
757 F.2d 1455 (1985)..... 13

Hyatt v. Heckley,
579 F. Supp. 985 (1984)..... 13, 30

ITT World Communications,
Inc. v. FCC, 635 F.2d 32,
(2d Cir. 1980)..... 26

Ithaca College v. NLRB,
623 F.2d 224 (2d Cir.),
cert. denied, 499 U.S. 975
(1980)..... 26

Page

Jones & Laughlin Steel Corp. v. Marshall, 636 F.2d 32 (3rd Cir. 1980)..... 26

Kosher v. Stamatis, *106 S. Ct. 1515 (1986)* *40*

Lopez v. Heckler, 725 F.2d 1489 (9th Cir.) vacated and remanded on other grounds, 469 U.S. 1082 (1984)..... 25, 27 29

Martin v. Secretary of H.E.W., 492 F.2d 905 (4th Cir. 1974)..... 3, 33, 34, 39

Mary Thompson Hospital, Inc. v. NLRB, 621 F.2d 858 (7th Cir. 1980)..... 26

Myers v. Califano, 611 F.2d 980 (4th Cir. 1980)..... 3, 33, 34, 38, 39

Pierce v. Underwood, No. 86-1512 cert. granted, (May 18, 1987)..... 46, 47, 48

	Page
Polaski v. Heckler, 804 F.2d 456 (1986), cert. denied, No. 86-1617 (June 16, 1987).....	4, 17, 18, 21, 22, 23, 31, 40, 43, 44, 45, 46, 49
Polaski v. Heckler, 739 F.2d 1320 (8th Cir. 1984).....	37
Rivera v. Heckler, 568 F. Supp. 235 (D.N.J. 1983).....	25
Rosenberg v. United States, 346 U.S. 273 (1953).....	27
Siedlecki v. Schweiker, 563 F. Supp. 43 (W.D. Wash 1983).....	25, 26
United States v. Mendoza, 464 U.S. 154 (1984).....	25, 44
Utah v. Ute Indian Tribe, 107 S. Ct. 596 (1986).....	40
Valdez v. Schweiker, 575 F. Supp. 1203 (D. Colo. 1983).....	25

STATUTES AND REGULATIONS

	Page
42 U.S.C. § 405(g).....	5, 10 18, 28 29, 41
28 U.S.C. § 2412(d).....	12
28 U.S.C. § 2412(d)(2)(A).....	47
S. Ct. Rule 21.1(a).....	32
Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460.....	Passim
Social Security Disability Benefits Reform Act of 1984, § 3(a)(2), 42 U.S.C.A. § 1382c (West Supp., 1987)....	34
Social Security Disability Benefits Reform Act of 1984, § 4(c), 42 U.S.C.A. § 423 (West Supp., 1987).....	34

MISCELLANEOUS

	Page
SSR 82-55.....	Passim
SSR 82-58.....	Passim
Adjudicatory Policy Memorandum to Administrative Law Judges (1982).....	2, 3
C. Fallon, Social Security & Legal Precedent, Case & Comment, Vol. 89, No. 2 at 4 (1984).....	26
H. R. Conf. Rep. 1039, 98th Cong., 2d Sess 29, 36-39, reprinted in 1984 U.S. Code Cong. & Admin. News 3038, 3096.....	13, 37

No. 86-1861

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

Otis R. Bowen, Secretary of the United States Department of Health and Human Services, Petitioner,

v.

Patrick M. Hyatt, Herman O. Caudle and Mary P. Lovingood, on behalf of themselves and all others similarly situated, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

A. *The Procedural Background of this Case.*

This case was the subject of a full trial on the merits in January 1984. App. 32a, ¶8. After receiving extensive evidence, including the testimony of

officials actually administering the Social Security Program in North Carolina, the trial court found that the Secretary of Health and Human Services was following a policy of intracircuit nonacquiescence. App. 40a-42a, 48a-49a, 54a-61a, 83a. In other words, the Secretary purposefully was refusing to follow controlling Court of Appeals' decisions construing the Social Security Act even when adjudicating claims arising in the very Circuit that had issued those decisions.[1/]

[1/] In January 1982, for example, the Secretary's Associate Commissioner for Hearings and Appeals instructed all administrative law judges to implement her policy of intracircuit nonacquiescence in this directive:

> [T]he federal courts do not run SSA's programs, and [the] ALJ's are responsible for applying the Secretary's policies and guidelines regardless of court decisions below the level of the Supreme Court.

Adjudicatory Policy Memorandum to Administrative
(continued)

The Court further found that the effect of this policy in North Carolina was systematic noncompliance with two important Fourth Circuit decisions. In *Martin v. Secretary of H.E.W.*, 492 F.2d 905 (4th Cir. 1974), the Fourth Circuit held that social security decisionmakers must consider whether hypertension or diabetes is disabling in the particular claimant's case even if it is not accompanied by end-organ damage. In *Myers v. Califano*, 611 F.2d 980 (4th Cir. 1980), the Fourth Circuit ruled that, if some cause for pain is established, decisionmakers must consider the claimant's own subjective accounts of the intensity of that pain, whether or not corroborated by "objective" or "clinical" evidence. The District Court found that decisionmakers

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Law Judges (1982), quoted in full in Joint Appendix [JA] filed with the Fourth Circuit at 353-54; *see also* JA 372-73.

in North Carolina systematically were deciding claims in violation of these holdings because they had been instructed to follow the Secretary's Social Security Rulings (in particular, SSR 82-55 and 82-58) regardless of the law of the Circuit. App. 43a-45a, 56a-57a.[2/]

[2/] The Court also found nonacquiescence in the "medical improvement" rule applicable in disability termination proceedings under *Dotson v. Schweiker*, 719 F.2d 80 (4th Cir. 1984). *See* App. 58a. Due to the intervention of Congress, this medical improvement issue and the claims of unnamed terminee class members are not before the Court. *See* Cert. Petn. 7-8. As in his petition in *Heckler v. Polaski*, *cert. denied*, No. 86-1617 (June 16, 1987), the Secretary cites this intervention of Congress to insinuate that the Court of Appeals erred in reinstating class relief on the theory that the class had become improperly represented. Cert. Petn. 6 n.3, 8 n.5. The Secretary's "arguments" in this regard, however, were not made to the Fourth Circuit on remand, were not made at any time in either lower court, and indeed are not raised by the questions presented in this petition for certiorari. Cert. Petn. (I). In any event, these suggestions of error are frivolous for reasons already explained to this Court. *See* Reply Br. in No. 85-474, *Hyatt v. Heckler*, filed Dec. 16, 1985 at 3 & n.3.

Having identified these systematic violations of the Social Security Act as interpreted by the Fourth Circuit, the District Court certified a statewide class of Social Security claimants victimized by the Secretary's policy. App. 65a-71a. In doing so, the Court concluded that it had jurisdiction over the claims of all plaintiff class members under 42 U.S.C. § 405(g).[3/] The District Court ordered new hearings for these class members and also entered injunctive relief. App. 62a-64a. The Secretary appealed.

In a decision issued March 20, 1985, a Fourth Circuit panel upheld the

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3/ Section 405(g), the judicial review provision of the Social Security Act, is reproduced at App. 104a. The statute is the pertinent jurisdictional provision in cases of this kind, because federal-question jurisdiction normally is unavailable in Social Security cases. *See, e.g., Heckler v. Ringer*, 104 S. Ct. 2013 (1984).

District Court's award of class-wide relief, including the award of new hearings to initial-applicant members of both the "Martin" and "Myers" subclasses. App. 26a-27a. In doing so, the Court observed that the plaintiff class "included claimants whose benefits were terminated because the Secretary did not follow this circuit's precedent," *id.* at 19a, and chastened the Secretary for his policy of nonacquiescence, *id.* at 20a-21a, 27a.

Based on earlier interpretations of section 405(g) in *Heckler v. Ringer*, 104 S. Ct. 2013 (1984), and *Hunt v. Schweiker*, 685 F.2d 121 (4th Cir. 1982), however, the Court of Appeals reduced the size of the plaintiff class. In particular, the Court of Appeals held that the District Court erred in assuming jurisdiction over those class members who had not fully exhausted administrative remedies. The

Court reached this conclusion because it read *Ringer* as requiring exhaustion whenever a plaintiff asserts "a claim that the Secretary was applying an improper standard for entitlement." App. 22-23a. The Court of Appeals also held that the District Court erred in including in the class persons who did not seek judicial review (or have this case pursued on their behalf) within 60 days after denial of their administrative claims. The Court considered itself bound by *Hunt* to reach this conclusion, noting that "[i]n this circuit, the 60-day requirement is considered to be jurisdictional" and therefore not subject to equitable tolling. App. 23a. Finally, the Court of Appeals vacated the District Court's award of injunctive relief based on its reading of the Social Security Disability Benefits Reform Act of 1984 (the "1984 Act"). App. 21a.

Following issuance of the Fourth Circuit's decision, the plaintiffs petitioned this Court for a writ of certiorari on the exhaustion, 60-day and injunction issues. This Court responded by holding in abeyance a ruling on the plaintiffs' petition pending its decision in *Bowen v. City of New York*, 106 S. Ct. 2022 (1986).

B. *The Decision in City of New York.*

City of New York brought before this Court precisely the same jurisdictional arguments of the Secretary that the Fourth Circuit had accepted in reducing the scope of the plaintiff class in this case. In *City of New York*, the plaintiffs had proven that, contrary to published regulations, the Secretary was concluding routinely that mentally impaired claimants were not disabled if they did not have one of the "listed impairments" set forth in the regulations. *See id.* at

2026-27 and n.5.[4/] The District Court held that the Secretary's unpublished policy was unlawful and ordered new benefit hearings for a class of claimants

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[4/] Under the regulations, the Secretary uses a five-step sequential evaluation process in disability cases. The first two steps focus on whether the applicant is actively working (if so, benefits are denied), and whether he or she suffers from some condition sufficient to be at least potentially determined to be disabling (if not, benefits are denied). The third step concerns whether the claimant has one of the "listed impairments" the Secretary views as conclusively establishing disability (if so, benefits are granted). If the claimant does not have a listed impairment, then the regulations require the decisionmaker to go on to determine whether the claimant is nonetheless unable to perform his former job (Step 4) or another job (Step 5) in light of his or her "residual functional capacity." *See generally* 106 S. Ct. at 2025. In *City of New York*, the plaintiffs proved that the Secretary was routinely determining--pursuant to a "presumption" that was "effectively conclusive," *City of New York v. Heckler*, 578 F. Supp. 1109, 1115 (1984)--that a claimant was not disabled if the claimant did not have a listed impairment, regardless of the claimant's residual functional capacity. This case, like *City of New York*, involves "effectively conclusive" presumptions with respect to hypertension and diabetes unaccompanied by end-organ damage and with respect to pain unaccompanied by objective evidence of its severity.

adversely affected by that unlawful policy. *City of New York* v. *Heckler*, 578 F. Supp. 1109, 1125. That class included persons who had not exhausted administrative remedies or strictly satisfied the 60-day time limit set forth in 42 U.S.C. § 405(g). 578 F. Supp. 1109. After the Second Circuit affirmed, 742 F.2d 729 (1984), this Court granted the writ of certiorari to consider the proper application of the exhaustion and 60-day rules.

On June 2, 1986, this Court issued its decision in *Bowen* v. *City of New York*, 106 S. Ct. 2022 (1986), and in a 9-0 ruling, rejected both of the Fourth Circuit's holdings that had led to its contraction of the plaintiff class in this case. In particular, this Court held: (1) that exhaustion of the Secretary's administrative procedures properly may be excused even when plaintiffs

challenge the Secretary's application of standards of entitlement, *id.* at 2031-33; *see* note 4 *supra*, and (2) that the 60-day time period of section 405(g) is not jurisdictional and is subject to equitable tolling, 106 S. Ct. at 2029-31. Based on these rulings, this Court--again by unanimous vote--affirmed in full the lower court's award of new hearings to all class members, including claimants who had not exhausted administrative remedies or brought suit within 60 days after the denial of their claims. *Id.* at 2033. One week later, this Court granted the petition for certiorari in this case, vacated the Fourth Circuit's March 1985 judgment, and remanded for reconsideration in light of *City of New York*.

Meanwhile, during the pendency of the plaintiffs' petition for certiorari in this Court, the District Court had

entered its second order awarding attorneys' fees to plaintiffs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (the "EAJA"). App. 92a-103a. The Secretary separately appealed that decision to the Fourth Circuit. On December 5, 1986, the Court of Appeals issued its decision addressing this Court's remand order and the attorneys' fees appeal. App. 1a-13a. It is this decision that the Secretary challenges by way of the petition now before the Court.

C. *The Fourth Circuit's Decision on Remand.*

In the decision now under review, the Court of Appeals reinstated as class members those claimants who, as in *City of New York*, had not exhausted administrative remedies or filed suit within 60 days after the final denial of their claims. In reaching this decision, the Court relied with emphasis on the policy

of intracircuit nonacquiescence established during the trial of this action. As explained by the Court of Appeals:

> On the basis of ample evidence the district court found that the Secretary instructed the North Carolina disability determination service and administrative law judges to follow the Secretary's regulations *instead of* circuit court decisions which conflict with the Secretary's interpretation of the Social Security Act. Also, the Secretary directed administrative law judges *not to cite* conflicting court decisions. 579 F. Supp. at 993-996. The Secretary's policy of nonacquiescence in the law of the circuit is well documented, and it has been the subject of congressional criticism. *See Hyatt v. Heckler*, 757 F.2d at 1459-60; H.R.Rep. 1039, 98th Cong., 2d Sess. 36-38, reprinted in 1984 U.S. Code Cong. & Admin. News 3038, 3096. The district court found, citing examples, that the Social Security Administration had applied the policy of nonacquiescence to members of several subclasses by failing to apply the law of the circuit in evaluating diabetes, hypertension, and pain.

App. 4a-5a (emphasis added). Again focusing on the trial evidence, the Fourth Circuit emphasized that these

"findings of historical fact are not clearly erroneous." App. 7a.

Confronted with this record, the Court of Appeals held that judicial relaxation of the exhaustion rule was "consistent with the analysis of the issue in *Bowen v. City of New York*." App. 7a. The Court reasoned that, "as in *City of New York*, the claim is collateral to the claim for benefits" and "claimants would be irreparably harmed if exhaustion requirements were enforced." App. 6a. The Court noted in particular this Court's observation in *City of New York* that "'[w]e should be especially sensitive to this kind of harm where the government seeks to require claimants to exhaust administrative remedies merely to enable them to receive the procedure they should have been afforded in the first place.'" App. 6a-7a, *quoting* 106 S. Ct. at 2032.

The Court of Appeals also found equitable tolling of the 60-day requirement to be proper. Again, the Fourth Circuit relied squarely on this Court's tolling analysis in *City of New York*, echoing in particular this Court's observation that these claimants "'were entitled to believe that their Government's determination of ineligibility was the considered judgment of an agency faithfully executing the laws of the United States.'" App. 7a, *quoting* 106 S. Ct. at 2030.

The Court of Appeals emphasized that its holdings with respect to the exhaustion and 60-day rules were narrow ones specifically based on the "exceptional circumstances" established by this record. App. 3a. Carefully tracking the principles laid down in *City of New York*, the Court explained that "waiver would not be available if a claimant alleges

mere deviation from applicable regulations," App. 3a, or "mere irregularities or errors," App. 8a. Relaxation of the normal section 405(g) rules was warranted only because the claimants in this case were the victims of "a systematic, unpublished policy that denied benefits in disregard of the law." App. 8a-9a.

Turning to the attorneys' fee question, the Court of Appeals affirmed the order of the District Court. The Court upheld in particular the District Court's finding that the Secretary was not "substantially justified" in "consciously and willfully disregard[ing] the law." App. 83a. The Court of Appeals could "perceive no factual or legal ground for departing" from the rule subjecting the Secretary to EAJA liability in cases of demonstrated intracircuit nonacquiescence. App. 11a-12a.

D. *The Polaski case.*

Approximately one month prior to the Fourth's Circuit's issuance of its decision in this case, the Eighth Circuit handed down its decision in *Polaski v. Heckler*, 804 F.2d 456 (1986). The *Polaski* case -- like this case -- involved a challenge to the Secretary's practice of evaluating pain in violation of governing circuit court law. That case -- like this case -- had been remanded by this Court for reconsideration in light of *City of New York*. In that case -- as in this case -- the Court of Appeals on remand held that *City of New York* called for a relaxation of strict application of section 405(g). On April 8, 1987, the Secretary filed a petition for certiorari seeking review of the Eighth Circuit's decision on remand in *Polaski*. In his subsequent petition in this case, the Secretary recommended that this case be

held in light of *Polaski*. On June 16, 1987, this Court denied the Secretary's petition in *Polaski* without comment or dissent.

DISCUSSION

This case is not a proper case for allowance of the writ of certiorari. Indeed, all the factors normally considered by this Court in making certiorari determinations indicate that this petition should be denied.

In its unanimous *City of New York* opinion, handed down just last term, this Court thoroughly explored the principles governing judicial relaxation of section 405(g)'s exhaustion and 60-day rules. This Court then acted in this very case, and the Court of Appeals on remand carefully adhered to this Court's instructions. In the decision below, the Fourth Circuit applied the plain rules set forth

in *City of New York* to the particular facts presented by this record. Indeed, the Court of Appeals itself declared its holding to be fact-specific and narrow, emphasizing that "waiver of the exhaustion requirement and tolling of the period of limitation will *rarely* be appropriate." App. 3a (emphasis added).

The Secretary can point to no decision by any other Court of Appeals--or indeed by any other court at all--with which the Fourth Circuit's decision conflicts. In fact, the development of a conflict is not even a future possibility, since the Secretary's previous policy of wholesale nonacquiescence, on which the Fourth Circuit's decision squarely rests, recently has undergone a major revision. *See* Cert. Petn. 17 n.9. Also during the course of this litigation, the Secretary has rescinded altogether one of the Social Security

Rulings his decisionmakers had applied in derogation of circuit court law, *see* Cert. Petn. 5 (discussing SSR 82-55), and has in practical effect significantly revised the other, *see* pages 36-38 *infra*. In light of these developments, the questions presented by this petition cannot and will not recur.

The decision of the Court of Appeals was made by an experienced panel of judges having extraordinary familiarity with this case.[5/] The panel's decision was unanimous, and the government's peti-

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5/ All Fourth Circuit proceedings have been before Judges Russell, Butzner and Hall. This same panel thus has considered no less than four full sets of briefs over the past three years, (*i.e.*, briefs on the initial merits appeal, briefs on the initial attorneys' fee appeal, supplemental briefs ordered by the Fourth Circuit following passage of the 1984 Act, and the extensive briefs filed following this Court's remand on June 9, 1986), three petitions for rehearing and numerous motions filed by the litigants. In addition, Judge Butzner, who wrote both panel opinions, also wrote the Fourth Circuit's decision in *Myers*.

tion for rehearing was denied without objection or comment. The result in the panel's initial decision and its studied application of *City of New York* on remand show that the lower court's approach to section 405(g) has been marked by caution and restraint.

This Court's denial, only a few days ago, of the Secretary's companion petition for certiorari in *Bowen v. Polaski, cert. denied,* No. 86-1617, clearly confirms that the petition in this case should be denied. The Secretary himself has acknowledged that "the issues in this case are closely related to those presented in *Bowen v. Polaski* because both cases involved "the Secretary's policies under SSR 82-58 regarding the evaluation of pain." Cert. Petn. at 14. In fact, the Secretary made precisely the same arguments for Supreme Court review in both petitions, with the notable excep-

tion that in *Polaski* the Secretary could advance a far *stronger* claim of possible error. *See* discussion at 25-26, *infra*. It is not surprising, in this setting, that the Secretary himself recommended that "the Court hold the petition in this case and *dispose of it as appropriate in light of the disposition in Polaski*." *Heckler v. Polaski*, No. 86-1617, Petition for Certiorai at 15 (emphasis added). Indeed, it would be fundamentally inequitable to impose further delay on these North Carolina claimants while identically situated claimants in the Eighth Circuit now proceed to receive prompt reconsideration of their claims.

The Secretary understandably wishes that this Court had decided *City of New York* differently. But, as in *Polaski*, that preference does not provide a persuasive reason for granting the writ of certiorari in this case. Nor has the

Secretary identified any other sound reason for further Supreme Court review.

Boiled down to basics, the Secretary's petition advances three arguments for allowance of the writ. First, as in *Polaski*, the Secretary argues that the Court of Appeals erred. Second, as in *Polaski*, the Secretary points to the burden he now confronts in administering the relief ordered by the lower courts. Third, the Secretary relies on *Polaski* itself in arguing that this Court should revisit section 405(g). As this Court's disposition of the *Polaski* petition indicates, none of these arguments provides a legitimate basis for intervention by this Court.

(1) The Secretary devotes most of his petition to arguing that the Fourth Circuit's decision is wrong. The Secretary's scattershot claims of error, however, are neither well-taken nor

deserving of plenary review by this Court.

(a) The Secretary initially contends that "the district court had no jurisdiction over these class members' claims" because "each such claimant declined to seek further review" after receiving "a personal notice informing him that his claim for benefits had been denied." Cert. Petn. 13-14. This argument, however, is not an argument at all, for it begs the very question presented; indeed, this Court unanimously rejected exactly the same argument in *City of New York*.

(b) Making an effort to distinguish *City of New York*, the Secretary contends that his policy of intracircuit nonacquiescence provides no justification for relaxing the exhaustion and 60-day rules. Cert. Petn. 15-17. The Secretary argues, for example, that intracircuit

nonacquiescence is merely one permissible manifestation of the rule exempting the federal government from the doctrine of nonmutual collateral estoppel. *See United States v. Mendoza*, 464 U.S. 154 (1984). The wholesale refusal by subordinate agency decisionmakers to follow controlling circuit court law, however, is a far cry from authorizing relitigation in court of particular issues earlier resolved against the government in different district or circuit courts.[6/] Nor can

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[6/] The Secretary's current reliance on *Mendoza* is also improper because the Secretary specifically abandoned her defense of the legality of nonacquiescence when the case first came before the Court of Appeals, and because the argument confuses the legality of nonacquiescence with whether or not sufficiently compelling equities exist to relax the usual limitations of § 405(g). In any event, the courts overwhelmingly have found impermissible the sort of intracircuit nonacquiescence at issue in this case. *Lopez v. Heckler*, 725 F.2d 1489, 1494, 1497 (9th Cir. 1984), *vacated and remanded on other grounds*, 469 U.S. 1082 (1984); *Valdez v. Schweiker*, 575 F. Supp. 1203 (D. Colo. 1983); *Rivera v. Heckler*, 568 F. Supp. 235 (D. N.J. 1983); *Siedlecki v.* (continued)

the Secretary persuasively contend that his flouting of the law should be ignored because "the Secretary in this case did not *formally announce* that SSA would not follow a particular decision." Cert. Petn. 16 (emphasis added). Indeed, a *sub rosa* policy of intracircuit nonacquiescence is even more pernicious than a policy that is openly disclosed. *Accord, e.g.*, C. Fallon, *Social Security & Legal Precedent*, Case & Comment, Vol. 89, No. 2 at 4 (1984).

The Secretary also grasps at straws in citing what the Court "appeared to

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Schweiker, 563 F. Supp. 43, 48 (W.D. Wash. 1983); *See ITT World Communications, Inc. v. FCC*, 635 F.2d 32, 43 (2d Cir. 1980); *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir.), *cert. denied*, 499 U.S. 975 (1980); *Jones & Laughlin Steel Corp. v. Marshall*, 636 F.2d 32, 33 (3rd Cir. 1980); *Allegheny General Hospital v. NLRB*, 608 F.2d 965, 970 (3rd Cir. 1979); *Beverly-Enters. v. NLRB*, 727 F.2d 591, 593 (6th Cir. 1984) (per curiam); *Mary Thompson Hospital, Inc. v. NLRB*, 621 F.2d 858, 864 (7th Cir. 1980); *Flores v. HEW*, 228 F. Supp. 877, 878 (D.P.R. 1964).

see," Cert. Petn. 16, in considering the emergency stay motions presented in *Heckler v. Lopez*, 463 U.S. 1328 (Rehnquist, J., acting as Circuit Justice); 464 U.S. 879 (denying motion to vacate stay of Circuit Justice). *See generally Rosenberg v. United States*, 346 U.S. 273, 286-87 (1953) (requiring substantial deference to stay issued by Circuit Justice). In fact, in *Lopez*, a unanimous Court ultimately *refused* to stay the Ninth Circuit's award of new hearings for nonacquiescence victims even though they had failed to exhaust administrative remedies. 466 U.S. 955 (1984), *reviewing stay of judgment after affirmance at* 725 F.2d 1489 (9th Cir. 1984). Although the Court did stay relief to class members who had not satisfied the 60-day requirement, it did so only to permit full exploration of the then-disputed issue whether the 60-day rule is jurisdictional. This Court, of course,

subsequently considered this very issue in *City of New York* and unanimously *rejected* the Secretary's position.

The Secretary's established policy of intracircuit nonacquiescence in fact makes this case an even stronger case than *City of New York* for relaxing section 405(g)'s exhaustion and 60-day rules. It makes no sense to require exhaustion in intracircuit nonacquiescence cases, for the very act of requiring exhaustion will provide the vehicle permitting agency decisionmakers to engage in the challenged practice of flouting circuit court law. Strict enforcement of the 60-day rule is also inappropriate in this context, because the judiciary should not be compelled to enforce a nonjurisdictional procedural rule to shield from judicial correction the Secretary's purposeful disregard of judicial authority. As the Ninth Circuit

observed in *Lopez*, the Secretary may not properly "[use] the procedural requirements as a mechanism for evading the law she is required to apply." *Lopez v. Heckler*, 725 F.2d 1489, 1506 (9th Cir.), *vacated and remanded on other grounds*, 469 U.S. 1082 (1984). The Secretary's proven practice of intracircuit nonacquiescence makes this case, if any case, an appropriate one in which to dispense with strict application of section 405(g).

(c) The Secretary also seeks to avoid *City of New York* by arguing that the informal nonacquiescence found to exist in this case was not so "'secret'" that "class members were lulled into inaction." Cert. Petn 17. The Fourth Circuit, however, persuasively responded to the Secretary's argument, concluding that considerations of "secrecy" in fact likened this case to *City of New York*. As

stated by the Court of Appeals after remand from this Court:

> We cannot accept the Secretary's argument. The Secretary never published the agency's informal policy of not following the law of the circuit with respect to hypertension, diabetes, and pain. On the contrary, as the district court found, the Secretary directed administrative law judges not to cite the conflicting court decisions. *See* 579 F. Supp. at 996. The effect of the unpublished nonacquiescence policy on North Carolina claimants was not disclosed until this case was tried. *See* 579 F. Supp 993-94.
>
> The evidence did not reveal mere irregularities or errors in individual cases. Instead, it depicted a systematic, unpublished policy that denied benefits in disregard of the law. It is unrealistic to believe that publication of both the agency's regulations and the court of appeals' decisions would alert lay persons to the Secretary's nonacquiescence in circuit law. The Hyatt claimants, no less than those in *Bowen v. City of New York*, were entitled to believe that agencies charged with evaluating claims according to law had faithfully performed their duties.

App. 8a-9a.

The Secretary's arguments respecting section 405(g) in effect reflect an effort to confine *City of New York* to its own facts. This Court itself, however, observed in *City of New York* that the facts of that case fell "well within" the "outer bounds of our holding." 106 S. Ct. at 2033. The Fourth Circuit's treatment of section 405(g) was careful, accurate, and strictly in keeping with this Court's analysis in *City of New York*. As in *Polaski*, that fact-bound analysis clearly provides no basis for further review by this Court.

(d) Finally, the Secretary challenges the Fourth Circuit's decision by arguing that he violated no one's rights at all; the reinstated class members, he says, should not receive relief because *no* class members ever should have prevailed. Cert. Petn. 11 n.7, 14, 16. This challenge to the lower courts'

underlying findings of liability--which has nothing at all to do with section 405(g)--comes too late.[7] In any event, the Secretary's liability arguments have no merit.

The Secretary advances two separate liability arguments. First, the Secretary argues that his policies "were not inconsistent with the Fourth

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[7] The Secretary chose not to cross-petition for certiorari on the liability question when this case was last before the Court, so that the petition this Court granted presented questions concerning only *jurisdiction* over claims of class members who had not complied with the exhaustion or 60-day rules and the availability of *injunctive relief* in this kind of case. *See* Cert. Petn. No. 85-474 at (i) and Brief for the Respondent in No. 85-474 at (I) (identifying questions presented). Accordingly, this Court's remand order could at most return *these issues* to the Circuit Court for reconsideration. *See* S. Ct. Rule 21.1(a) (last sentence). Indeed the Secretary argued on remand, and the Fourth Circuit agreed, that this Court's remand order did not put back before the Fourth Circuit even the injunction question that *had been* presented in the plaintiffs' granted petition for certiorari, App. 9a; *a fortiori*, it was not and is not open to the Secretary to reargue the underlying issue of liability in this case.

Circuit's decisions in *Martin* and *Myers*." Cert. Petn. 16. The District Court, however, both found noncompliance with *Martin* and *Myers* in actual practice and pervasively demonstrated the facial inconsistency between the Secretary's Social Security Rulings and the holdings of these Fourth Circuit cases. App. 43a, 56a-57a. The Secretary's claim of compliance with *Martin* and *Myers* has a particularly hollow ring in the posture this case now occupies. The Fourth Circuit itself already twice has rejected the same claims of compliance with Fourth Circuit law the Secretary again makes in this petition.

In his second liability argument, the Secretary contends that Congress "ratified" the Secretary's "policies" in enacting the 1984 Act. It follows, the Secretary argues, that his policies were always "valid"; thus the lower courts

must have erred in granting relief based on their implementation. Cert. Petn. 14. The most apparent fallacy in this argument is that Congress in 1984 could not and did not change pre-existing law. That law, in the Fourth Circuit, was the Social Security Act as interpreted in *Martin* and *Myers*. There is nothing whatsoever in the 1984 Act purporting retroactively to alter these decisions or the principles they state. *See* 1984 Act § 3(a)(2), Social Security Disability Benefits Reform Act of 1984, § 3(a)(2), 42 U.S.C.A. § 1382c (West Supp. 1987), (making statutory pain standard applicable through future date so as to give Congress time for further study); *id.* at § 4(c), *id.* at 4[illegible] (making new section 4 applicable more than "30 days after enactment of this Act").

In any event, the Secretary reads far too much into the 1984 Act when he

argues that the Act "ratified" even prospectively the "administrative standards" found unlawful by the lower courts. Cert. Petn. 14. With respect to hypertension and diabetes, the Secretary argues that Section 4 of the 1984 Act implicitly endorsed the Secretary's use of a "severe impairment" test in the five-step sequential evaluation process. *See Bowen v. Yuckert*, No. 85-1409 (U.S. June 8, 1987); *see generally* note 4, *supra*. *Martin*, however, did not question at all the propriety of using a "severe impairment" test; rather, *Martin* merely rejected the Secretary's position that end-organ damage is an exclusive precondition to the establishment of disability from hypertension or diabetes. *See Yuckert*, *supra*, slip op. at 15 n.12 (Court notes that "we have no occasion to consider whether [the severe impairment regula-

tion] is valid *as applied*;" emphasis added).

Faced with this fact, the Secretary implies that Congress "ratified" even the Secretary's treatment of hypertension and diabetes because a Senate and Conference Report noted that the Secretary's severity policy was "elaborated [upon] in rulings." Cert. Petn. 9 n.6. The suggestion that this uninformative tidbit of legislative history somehow was intended to repudiate the specific holding of *Martin* simply is not persuasive. *See also Yuckert, supra*, slip op. at 13 n.9 and 15 n.12 (noting that House Report accompanying 1984 Act "urged the Secretary to reevaluate the severity criteria to determine whether they were too strict").

The Secretary also misinterprets the effect on this case of Congress' "ratification" of the Secretary's policy on pain. To be sure, Congress indicated an

intent to codify the Secretary's "current" policy with respect to pain in passing section 3 of the 1984 Act. H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 29 (1984). At the time Congress acted, however, the Secretary had restated his pain policy in a formal consent order filed in the *Polaski* litigation in a manner that reflected a substantial modification of the pain rule that had been applied to these class members. *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984). In the *Polaski* consent order, issued six months after the trial in this case, the Secretary purported to clarify the Administration's pain policy, including by recognizing (contrary to prior agency practice) the propriety of considering purely subjective evidence of the intensity of pain. This "clarification" in the *Polaski* consent order had not been set forth in the text of SSR 82-58

and incontrovertibly was not the "policy" applied in North Carolina to these class members' claims. *See* App. 44a-45a. Because Congress "ratified" a policy that was never applied to the claims of these class members, the Secretary cannot reasonably argue that such ratification demonstrates an error in the findings in this case. For all these reasons, as in *Polaski*, the Secretary's ratification argument is neither meritorious nor deserving of this Court's review.[8/]

[8/] Nor is there any basis for the Secretary's related argument that this purported "ratification" by the 1984 Act somehow stripped the lower courts of the power to afford any remedy to the pain claimants in this case. *See* Cert. Petn. 17-18. These claimants are entitled to a remedy because the Secretary violated their rights by not reviewing their claims in accordance with governing law. The Fourth Circuit has remedied this wrong by ordering agency reconsiderations conducted in conformance with governing law. Notably, the Fourth Circuit recently interpreted section 3 of the 1984 Act, in conformance with *Myers*, to require consideration of purely subjective evidence of the intensity of pain. *See Foster v. Heckler*, 780 F.2d 1125 (4th Cir. 1986). (continued)

At bottom, the Secretary's argument about congressional "ratification" and the alleged consistency of his "policies" with *Martin* and *Myers* misses the basic point of the proof in this case. That proof showed that the Secretary's decisionmakers were *in real life* systematically misevaluating claims concerning pain, hypertension and diabetes. *See* JA 186, 187, 194-95, 292, 296-97, 300-01, 360, 362, 363-64. These violations were established by the evidence and the trial court's findings--regardless of the Secretary's current description of his current "policies" and regardless of the enactment of legislation months after the trial of this case.

As a result, under the court's remand order, these claimants should receive precisely the sort of review they initially should have received, but did not receive because of the Secretary's illegal conduct.

(2) The Secretary's protestations about facing a significant burden also do not justify Supreme Court review. This Court regularly denies petitions grounded principally on the onerousness of the judgment challenged in this Court.[9/] Moreover, as the *Polaski* case illustrates, the Secretary can claim no exemption from this practice. Indeed, the reasons behind the practice--the press of other Court business, the presumed adequacy of lower court review, the need for finality in litigation and the unique role of this tribunal as the arbiter of recurring questions of legal doctrine--press especially hard against allowance of the

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[9/] Cases involving life imprisonment, and even the death penalty, are illustrative. Numerous civil cases also come to mind. *See, e.g. Utah v. Ute Indian Tribe*, 107 S. Ct. 596 (1986); *Kosher v. Stamatis*, 106 S. Ct. 1515 (1986); *Elrod v. Suran*, 465 U.S. 1108 (1984); *Holloway v. Valley*, 464 U.S. 914 (1983).

Secretary's petition in this case. The Secretary, for example, already has had a full opportunity to litigate this case at all three levels of the federal judiciary. This Court, just last term, treated fully the general principles of section 405(g) jurisdiction that the Secretary asks this Court to revisit in this case. This judicial review proceeding--which has been pending since 1983 and involves potential relief for claimants unlawfully denied benefits as long ago as 1981--cries out with a vengeance for finality.

The government's plea of burdensomeness also comes to the Court unaccompanied by any convincing claim of equity. It was the Secretary, after all, who chose to flout controlling judicial authority in a systematic and sweeping fashion. *See, e.g.*, App. 48a at ¶¶ 68-69. Given the scope of the Secretary's wrong-

ful conduct, it is neither surprising nor unfair that the lower courts have ordered the Secretary to afford broad relief. Indeed, in *City of New York* this Court rejected the same protestations the Secretary now makes with words that continue to ring true:

> [W]e are aware that administrative inconvenience may result from our decision today. But the Secretary had the capability and the duty to prevent the illegal policy found to exist by the District Court."

106 S. Ct. at 2033.

In addition, while the administrative burden the Secretary faces may be substantial, it pales in comparison to the burden imposed on these class members. Both the Court of Appeals and the District Court have recognized the irreparable injury that these class members continue to endure. App. 6a, 47a. As explained by the District Court, the availability of benefits "means for

many of the members of plaintiffs' class the difference between existence at a bare subsistence level and the ability to pay the utility bills to keep warm in freezing temperatures, or to purchase an occasional item of clothing or piece of meat . . . . No amount of retroactive benefits can compensate for years of deprivation and anxiety--which may even ultimately result in death." App. 53a. The continuing human toll these class members face is no less deserving of this Court's attention than the administrative burden the Secretary has brought upon himself.

(3) Nor can the Secretary persuasively rely on the Eighth Circuit's decision in *Polaski* in seeking review by this Court. *See* Cert. Petn. 14. Obviously, what now is most telling about *Polaski* is that this Court unanimously *denied* the Secretary's petition for

certiorari in that case. This result was hardly surprising, for this Court has emphasized "the benefit it receives from permitting *several* courts of appeals to explore a difficult question before this Court grants *certiorari*," and "its practice of *waiting for a conflict to develop* before granting the Government's petition." *Mendoza*, *supra*, 464 U.S. at 160 (emphasis added). The lower courts' decisions in *Polaski* and this case were the very first decisions to apply *City of New York*. Those decisions conflict neither with each other nor with *any* decision of *any* other court. Well-established principles of certiorari jurisdiction thus dictated the proper disposition in *Polaski*, just as they do in this case.

Indeed, this Court's denial of the writ in *Polaski* establishes *a fortiori* that there is no basis for allowance of the writ here. This case came to the Court

of Appeals on findings made after a full trial on the merits; the Eighth Circuit in contrast, acted only on an appeal of a preliminary injunction. On remand from this Court, the Fourth Circuit carefully detailed the "exceptional circumstances" justifying a departure from the general exhaustion and 60-day rules, *see* App. 3a, 6a-9a; that Court, accordingly, is not possibly subject to criticism for being "almost casual" in its analysis. Compare *Polaski* Cert. Petn. 12 and 19.

Most significantly, however, the Eighth Circuit in *Polaski* neither found nor relied upon a policy of intracircuit nonacquiescence. Rather, as the Secretary repeatedly emphasized in his *Polaski* petition, the Eighth Circuit's decision rested on a Consent Order specifying only that "some adjudicators" had "misinterpreted" operative law. *See Polaski* Cert. Petn. 10, 11, 17, 19, 21.

The lower courts' additional finding of and focus on the Secretary's systematic nonacquiescence in this case plainly make it an even more compelling case than *Polaski* for relaxing the general rules of section 405(g). The denial of the writ in *Polaski* thus clearly indicates that the writ should be denied here.

(4) Finally, there is no sound reason to hold the attorneys' fee question presented by the Secretary's petition in light of *Pierce* v. *Underwood*, *cert. granted*, No. 86-1512 (May 18, 1987). *Underwood* is not relevant here because it involved neither intracircuit nonacquiescence nor any conduct akin to it, and the linchpin of both the District Court's findings (App. 83a, 94a) and the Fourth Circuit's reasoning with respect to attorneys' fees was the Secretary's nonacquiescence. As the Fourth Circuit flatly stated: "The primary issue, on

which the outcome of this case depended, was the Secretary's policy of nonacquiescence in the law of the circuit." (App. 11a). Accordingly, a "hold" on the "substantially justified" issue would not be appropriate.

Nor is a hold warranted on the ground that *Underwood* involves a challenge to a fee award in excess of $75 per hour. The District Court in this case adjusted counsel fees above $75 per hour only after making a specific finding of the unavailability of other qualified attorneys (as is authorized by the very terms of the statute, *see* 28 U.S.C. § 2412(d)(2)(A)), and determining that an adjustment to the rate was justified by increases in the cost of living (as is also specifically permitted by the terms of the statute, *see id.*). *See* App. 88a, 102a. *Underwood*, which involved no specific finding regarding the availabil-

ity of counsel and which does not concern the relevance of cost of living adjustments at all, simply is not pertinent in these circumstances. In any event, the fee increases involved here were modest and gave rise to only a fraction of the challenged award.[10/] To hold this petition for this reason in these circumstances would be truly to let the tail wag the dog.

CONCLUSION

Both this Court's established rules of practice and powerful considerations

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10/ The District Court increased the hourly fee award for some counsel in this case to either $83 or $95 per hour for work performed from 1983-85. App. 88a, 102a. These figures compare with an award in *Underwood* of $120 per hour for work performed in 1982. Indeed all but $2,836 of the total fee award made by the District Court in this case (*i.e.*, the amount based on increases for Fillette, Hayes and Harper above $83 per hour in the initial award, *see* App. 88a) reflects the fixing of fees at $75 or less, together with cost-of-living adjustments not even at issue in *Underwood*.

of fairness and finality dictate that the Court should deny the Secretary's petition for the writ of certiorari. Moreover, the appropriateness of this result is now especially clear in light of this Court's denial of the Secretary's companion petition in the *Polaski* case. For all the reasons set forth above, respondents respectfully request that this Court deny *en toto* the Secretary's petition in this case.

Respectfully submitted.

John R. Wester
(*Counsel of Record*)

Dan T. Coenen

ROBINSON, BRADSHAW & HINSON, P.A.
1900 Independence Center
Charlotte, North Carolina 28246
(704) 377-2536

Charles McBrayer Sasser

LEGAL SERVICES OF SOUTHERN PIEDMONT, INC.
951 South Independence Boulevard
Charlotte, North Carolina 28202
(704) 376-1608

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COUNSEL FOR RESPONDENTS